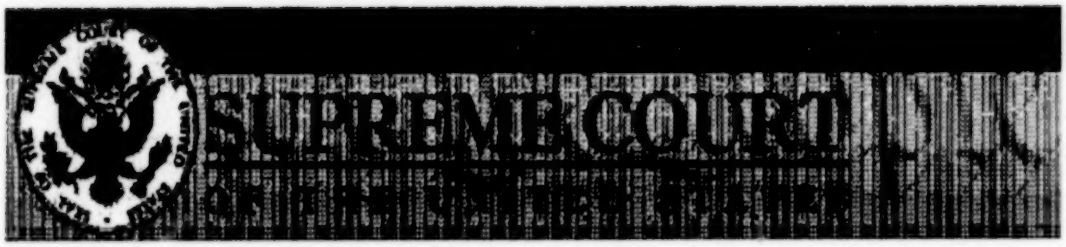
DOCKET



No. 13-433

Title:	Integrity Staffing Solutions, Inc., Petitioner
	v.
	Jesse Busk, et al.
Docketed:	October 8, 2013
Linked with 13A165	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(11-16892)
Decision Date:	April 12, 2013
Rehearing Denied:	June 3, 2013

Questions Presented

--- Date ---	------ Proceedings and Orders ----------
Aug 5 2013	Application (13A165) to extend the time to file a petition for a writ of certiorari from September 1, 2013 to October 3, 2013, submitted to Justice Kennedy.
Aug 12 2013	Application (13A165) granted by Justice Kennedy extending the time to file until October 3, 2013.
Oct 3 2013	Petition for a writ of certiorari filed. (Response due November 7, 2013)
Oct 15 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel or the petitioners.
Nov 4 2013	Waiver of right of respondents Jesse Busk, et al. to respond filed.
Nov 7 2013	Brief amici curiae of International Municipal Lawyers Association, et al. filed.
Nov 7 2013	Brief amici curiae of Retail Litigation Center Inc., et al. filed.
Nov 12 2013	DISTRIBUTED for Conference of November 26, 2013.
Nov 13 2013	Response Requested. (Due December 13, 2013)
Dec 3 2013	Order extending time to file response to petition to and including January 13, 2014.
Jan 13 2014	Brief of respondents Jesse Busk, and Laurie Castro, et al. in opposition filed.
Jan 28 2014	Reply of petitioner Integrity Staffing Solutions, Inc. filed.
Jan 29 2014	DISTRIBUTED for Conference of February 21, 2014.
Feb 24 2014	DISTRIBUTED for Conference of February 28, 2014.
Feb 25 2014	Letter of February 25, 2014, from counsel for respondents received. (Distributed)
Mar 3 2014	Petition GRANTED.
Mar 26 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 28, 2014.
Apr 17 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Apr 25 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither

	party, received from counsel for the respondents
May 9 2014	The time to file respondents' brief on the merits is extended to and including August 4, 2014.
May 28 2014	Joint appendix filed. (Statement of costs filed)
May 28 2014	Brief of petitioner Integrity Staffing Solutions, Inc. filed.
Jun 4 2014	Brief amicus curiae of the United States filed.
Jun 4 2014	Brief amici curiae of Retail Litigation Center, Inc., et al. filed.
Jun 4 2014	Brief amici curiae of National League of Cities, et al. filed.
Jun 4 2014	Brief amicus curiae of National Retail Federation filed.
Jul 9 2014	Record requested from U.S.C.A. 9th Circuit.
Jul 16 2014	SET FOR ARGUMENT Wednesday, October 8, 2014
Jul 17 2014	Record received from U.S.C.A. 9th Circuit is electronic and located on PACER.
Jul 17 2014	Record received from U.S.D.C. District of Nevada is electronic and located on PACER
Aug 4 2014	Brief of respondents Jesse Busk and Laurie Castro, et al. filed.
Aug 7 2014	CIRCULATED.
Aug 8 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 8 2014	Brief amicus curiae of American Federation of Labor and Congress of Industrial Organizations filed. (Distributed)
Aug 11 2014	Brief amicus curiae of National Employment Lawyers Association filed. (Distributed)
Sep 3 2014	Reply of petitioner Integrity Staffing Solutions, Inc. filed. (Distributed)
Oct 2 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 8 2014	Argued. For petitioner: Paul D. Clement, Washington, D. C.; and Curtis E. Gannon, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: Mark R. Thierman, Reno, Nev.

PETITION FOR WRIT OF CERTIORARI

13-433

NO. _____

In the
Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC.,

Petitioner,

v.

JESSE BUSK and LAURIE CASTRO, on behalf of themselves and all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

NEIL M. ALEXANDER
RICK D. ROSKELLEY
ROGER L. GRANDGENETT II
CORY GLEN WALKER
LITTLER MENDELSON
3960 Howard Hughes Parkway, Suite 300
Las Vegas, NV 89169
(702) 862-8800

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

October 3, 2013

QUESTION PRESENTED

Respondents are warehouse workers who seek back pay, overtime, and double damages under the Fair Labor Standards Act ("FLSA") for time spent in security screenings after the end of their work shifts. Relying on an unbroken line of authority from other jurisdictions, the district court dismissed Respondents' claims because security screenings are quintessential "preliminary" or "postliminary" activities that are non-compensable under the FLSA pursuant to the Portal-to-Portal Act of 1947. The Ninth Circuit reversed, holding that time spent in security screenings was compensable under the FLSA because it was "necessary to [Respondents'] primary work as warehouse employees." That holding squarely conflicts with decisions from the Second and Eleventh Circuits holding that time spent in security screenings is not subject to the FLSA because it is *not* "integral and indispensable" to employees' principal job activities.

The question presented is whether time spent in security screenings is compensable under the FLSA, as amended by the Portal-to-Portal Act.

PARTIES TO THE PROCEEDING

Petitioner Integrity Staffing Solutions, Inc., was the defendant in the district court and appellee in the Ninth Circuit. Respondents Jesse Busk and Laurie Castro were plaintiffs in the district court and appellants in the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner Integrity Staffing Solutions, Inc., does not have a parent corporation, and no publicly traded corporation owns 10% or more of its stock.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
CORPORATE DISCLOSURE STATEMENT iii
TABLE OF AUTHORITIES vi
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY AND REGULATORY PROVISIONS INVOLVED 1
INTRODUCTION 1
STATEMENT OF THE CASE 6
A. The Fair Labor Standards Act and Portal-to-Portal Act 6
B. Respondents' Complaint and the District Court's Decision 9
C. The Ninth Circuit's Decision 11
REASONS FOR GRANTING CERTIORARI 12
I. The Ninth Circuit's Decision Is Clearly Wrong And Conflicts With The Decisions Of Two Other Courts Of Appeals 13
A. The Ninth Circuit Badly Misconstrued the Portal-to-Portal Act and This Court's Precedents. 13
B. The Ninth Circuit's Decision Conflicts With Decisions of the Second and Eleventh Circuits 18

II. The Ninth Circuit's Erroneous Decision Will Have Far-Reaching Implications For Employers, And Has Already Spawned Class-Action Suits Across The Country 23

CONCLUSION 29

APPENDIX

Appendix A

Opinion of the United States Court of Appeals for the Ninth Circuit, *Busk v. Integrity Staffing Solutions, Inc.*, No. 11-16892 (Apr. 12, 2013) App-1

Appendix B

Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing and Petition for Rehearing En Banc, *Integrity Staffing Solutions, Inc.*, No. 11-16892 (June 3, 2013) App-18

Appendix C

Order of the United States District Court for the District of Nevada Dismissing Plaintiffs' First Amended Complaint, *Busk v. Integrity Staffing Solutions, Inc.*, No. 10-cv-1854 (July 19, 2011) App-19

Appendix D

Relevant Statute & Regulation

29 U.S.C. § 254 ..... App-36

29 C.F.R. § 790.7 ..... App-39

TABLE OF AUTHORITIES

Cases

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 680 (1946) 6, 7, 16, 24

Anderson v. Perdue Farms,
604 F. Supp. 2d 1339 (M.D. Ala. 2009) 22

Bonilla v. Baker Concrete Construction,
487 F.3d 1340 (11th Cir. 2007) 4, 20, 21

Ceja-Corona v. CVS,
No. 12-1868, 2013 WL 3282974
(E.D. Cal. June 27, 2013) 26

Ceja-Corona v. CVS,
No. 12-1868, 2013 WL 796649
(E.D. Cal. Mar. 4, 2013) 26

Gorman v. Consolidated Edison Corp.,
488 F.3d 586 (2d Cir. 2007) ..... *passim*

IBP v. Alvarez,
546 U.S. 21 (2005) 4, 9, 13, 15

Mem. & Order, *Jones v. Best Buy Co.*,
No. 12-cv-95 (D. Minn. Apr. 12, 2012) 22

Sleiman v. DHL Express,
No. 09-0414, 2009 WL 1152187
(E.D. Pa. Apr. 27, 2009) 22

Steiner v. Mitchell,
350 U.S. 247 (1956) ..... *passim*

Yi v. Sterling Collision Centers,
480 F.3d 505 (7th Cir. 2007) 28

Statutes & Regulations

29 U.S.C. § 202(a) 6

29 U.S.C. § 206 ..... 2, 6

29 U.S.C. § 207 ..... 2, 6
29 U.S.C. § 251 ..... 8, 13, 26
29 U.S.C. § 254(a) 2, 8, 13
29 U.S.C. § 254(b) 9, 25
29 C.F.R. § 790.7 ..... *passim*
29 C.F.R. § 790.8 ..... 13, 14

Other Authorities

Class Action and FLSA Collective Action Complaint, *Allison v. Amazon.com*, No. 2:13-cv-1612 (W.D. Wash. Sept. 6, 2013) 27

Class Action Complaint, *Frlekin v. Apple Inc.*, No. 3:13-cv-3451 (N.D. Cal. July 25, 2013) 26, 27

Class Action Complaint, *Vance v. Amazon.com*, No. 3:13-cv-765 (W.D. Ky. Aug. 1, 2013) 27

Collective Action and Class Action Complaint, *Johnson v. Amazon.com*, No. 1:13-cv-153 (W.D. Ky. Sept. 17, 2013) 27

Collective Action Complaint, *Suggars v. Amazon.com*, No. 3:13-cv-906 (M.D. Tenn. Sept. 9, 2013) 27

First Amended Class Action Complaint, *Ceja-Corona v. CVS*, No. 1:12-cv-1868 (E.D. Cal. July 15, 2013) 26

Kase, *Amazon Workers Want Pay for Time Spent at Security Checkpoint* (Apr. 25, 2013), *at* http://blogs.lawyers.com/2013/04/amazon-workers-want-pay-for-time-at-security/ 28

Payment Deferred, Time (Jan. 6, 1947) 8
S. Rep. No. 75-884 (1937) 6
S. Rep. No. 81-640 (1949) 6

PETITION FOR WRIT OF CERTIORARI

Petitioner Integrity Staffing Solutions, Inc. ("Integrity") respectfully submits this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 713 F.3d 525 and reproduced at Pet.App.1-17. The district court's opinion is reproduced at Pet.App.19-35.

JURISDICTION

The Ninth Circuit issued its decision on April 12, 2013. Integrity filed a timely petition for panel rehearing and rehearing en banc, which the court denied on June 3, 2013. Pet.App.18. On August 12, 2013, Justice Kennedy extended the time for filing this petition to and including October 3, 2013. *See* No. 13A165. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Portal-to-Portal Act of 1947, 29 U.S.C. § 254, and the Department of Labor's regulations, 29 C.F.R. § 790.7, are reproduced at Pet.App.36-45.

INTRODUCTION

In the decision below, the Ninth Circuit disregarded the plain text of the Portal-to-Portal Act of 1947 and this Court's precedents and, in doing so, departed from an unbroken line of authority holding that employees are not entitled to compensation

under the Fair Labor Standards Act ("FLSA") for time spent in security screenings. Certiorari is warranted to resolve this circuit split on a question of national importance. Indeed, the Ninth Circuit's decision has *already* resulted in a spate of new nationwide class-action suits against major employers seeking back pay for time spent in security screenings. If allowed to stand, the decision below will result in massive retroactive liability for employers, and will fundamentally upend the careful balance struck by Congress in the FLSA and Portal-to-Portal Act.

* * *

The FLSA sets a minimum hourly wage and requires overtime compensation when a covered employee works more than 40 hours in a "workweek." *See* 29 U.S.C. §§ 206, 207. Early judicial interpretations of the FLSA adopted an expansive conception of "work," holding that employees must be compensated for all time *spent on the employer's premises*, even if they were not engaged in productive work. Those decisions resulted in a flood of litigation in which employees sought billions of dollars of back pay for activities such as walking from the parking lot to the workplace, punching in and out, and changing clothes.

Congress responded with the Portal-to-Portal Act of 1947, which makes clear that the FLSA does not apply to activities that are "preliminary" or "postliminary" to an employee's primary job responsibilities. 29 U.S.C. § 254(a). This Court has construed the Portal-to-Portal Act as requiring compensation only for tasks that are an "*integral and*

indispensable part of the principal activities for which covered workmen are employed." *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956) (emphasis added).

Petitioner Integrity Staffing Solutions provides staffing for warehouses owned by Amazon.com. Respondents are former Integrity warehouse employees; their primary job duties involved retrieving items from inventory to fill orders placed by Amazon.com customers. After punching out at the end of their shifts, Respondents were required to go through a short security screening in which they removed personal belongings from their pockets and walked through a metal detector.

In October 2010, Respondents filed a class-action complaint against Integrity, alleging violations of the FLSA and seeking back pay and overtime (plus double damages) for time spent in security screenings. The district court granted Integrity's motion to dismiss, recognizing—correctly—that Respondents were not entitled to compensation under the FLSA because time spent walking through a security screening was not "integral and indispensable" to Respondents' principal activities of "fulfilling online purchase orders." Pet.App.27. But, in a stark departure from an otherwise-unbroken line of authority, the Ninth Circuit reversed, holding that Respondents could state a claim under the FLSA based on Integrity's failure to provide compensation for time spent in post-shift security screenings. In its brief analysis of this issue, the Ninth Circuit concluded that the security screenings were compensable under the FLSA because they were

"required" by Integrity and were performed "for Integrity's benefit." Pet.App.11-12.

* * *

The Ninth Circuit's decision cannot be squared with the plain text of the Portal-to-Portal Act and this Court's decisions interpreting that statute. Security screenings are a paradigmatic example of an activity that is non-compensable because it is "preliminary" or "postliminary" to employees' primary job duties. Respondents were employed to process and fill online orders, and the security screenings took place after the productive work for which they were employed had been completed. Security screenings are indistinguishable from many other tasks that have been found non-compensable under the FLSA, such as waiting to punch in and out on the time clock, walking from the parking lot to the workplace, waiting to pick up a paycheck, or waiting to pick up protective gear before donning it for a work shift. All of these activities are "required" in a broad, but-for sense, but they are not compensable under the FLSA because such tasks are fundamentally distinct from employees' actual *job duties*. *See, e.g.*, 29 C.F.R. § 790.7(f)-(g); *IBP v. Alvarez*, 546 U.S. 21, 40-41 (2005).

The Ninth Circuit's decision conflicts with decisions from the Second and Eleventh Circuits holding that, under the FLSA and Portal-to-Portal Act, employees are *not* entitled to compensation for time spent in security screenings. *See Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007); *Bonilla v. Baker Concrete Construction*, 487 F.3d 1340 (11th Cir. 2007). Indeed, the Second

Circuit has emphasized that "security-related activities" are "*modern paradigms* of the [non-compensable] preliminary and postliminary activities described in the Portal-to-Portal Act." *Gorman*, 488 F.3d at 593 (emphasis added).

It is critically important that this Court resolve the split by reversing the decision below. If allowed to stand, the Ninth Circuit's decision threatens to impose massive retroactive liability on employers, and to render the Portal-to-Portal Act—which was enacted to *prevent* an unduly expansive application of the FLSA—largely toothless. This is not hyperbole or speculation. In the six months since the decision below was issued, plaintiffs' lawyers have brought nationwide class actions against a number of major employers—including Apple, Amazon.com, and CVS—seeking back pay (plus overtime and penalties) for time spent in security screenings. Because of the ease with which nationwide FLSA class actions can be brought, the Ninth Circuit's decision threatens to become the *de facto* national standard. But, especially given the conflicting decisions of the Second and Eleventh Circuits, this Court, and not the Ninth Circuit, should establish the national standard.

Moreover, because the Ninth Circuit's decision was a dramatic change in what had been a settled area of the law, employers across the country face the prospect of massive retroactive liability. Under these circumstances, certiorari is plainly warranted so that this Court can establish a uniform rule on this important issue.

STATEMENT OF THE CASE

A. The Fair Labor Standards Act and Portal-to-Portal Act

1. The FLSA was enacted in 1938 to address "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). The statute's declared objectives were "to improve the standard of living of those who are now undernourished, poorly clad, and ill-housed," S. Rep. No. 75-884, at 3 (1937), and to "protect this Nation from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health," S. Rep. No. 81-640, at 3 (1949).

The FLSA pursued these objectives by establishing "a few rudimentary standards" so basic that "[f]ailure to observe them [would have to] be regarded as socially and economically oppressive and unwarranted under almost any circumstance." S. Rep. No. 75-884, at 3. The Act therefore proscribed the use of child labor, imposed a minimum wage for most jobs, and established a general rule that individuals working more than forty hours in a given "workweek" were entitled to time-and-one-half pay for those additional hours. *See* 29 U.S.C. §§ 206, 207.

Because the FLSA does not define the critical terms "work" and "workweek," disputes quickly arose over what types of activities were covered by the statute. In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 683 (1946), employees at a dishware factory argued that the FLSA required compensation for

activities such as: waiting in line to punch in and out, walking between the time clock and the work stations, putting on aprons and overalls, and preparing work areas for the start of production. This Court largely agreed, holding that, "[s]ince the statutory workweek includes *all time during which an employee is necessarily required to be on the employer's premises* , the time spent in these activities must be accorded appropriate compensation." *Id.* at 690-91 (emphasis added).

Justices Burton and Frankfurter dissented. In reasoning that would later be reflected in the Portal-to-Portal Act, the dissenting Justices emphasized that "[n]one of this time would have been spent at productive work," and that "[t]he futility of requiring an employer to record these minutes and the unfairness of penalizing him, for failure to do a futile thing, by imposing arbitrary allowances for 'overtime' and liquidated damages is apparent." 328 U.S. at 697. They further concluded that "the obvious, long established, and simple way to compensate an employee for such activities is to recognize those activities in the rate of pay for the particular job. *Id.* That is, "[t]hese items are appropriate for consideration in collective bargaining." *Id.*

2. In the wake of *Mt. Clemens*, the courts were flooded with claims seeking billions of dollars of compensation for similar "preliminary" and "postliminary" activities. Those suits "came so fast that newspapers ran lists of companies sued in long columns, like disaster victims. The unions sued Bethlehem Steel for $200,000,000, Curtis-Wright for $29,000,000, National Biscuit Co. for $50,000,000,

and prepared to sue the Ford Motor Co. for $300,000,000." *Payment Deferred*, Time (Jan. 6, 1947). The legal theory underlying those suits was that "[f]or all the time *spent on company property*—except for insignificant amounts—a worker must be paid." *Id.* (emphasis added).

In May 1947, Congress enacted the Portal-to-Portal Act in response to this "disregard of long-established customs, practices, and contracts between employers and employees." 29 U.S.C. § 251(a). Congress found that the FLSA, as construed in *Mt. Clemens*, had resulted in "wholly unexpected liabilities, immense in amount and retroactive in operation," that threatened to "give rise to great difficulties in the sound and orderly conduct of business and industry." *Id.*

The Portal-to-Portal Act provides in relevant part that "no employer shall be subject to any liability or punishment under the [FLSA]" for either: (1) time in which an employee is "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform," or (2) "activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time at which such employee commences, or subsequent to the time at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a). The Act also makes clear that, although the FLSA does not *require* compensation for preliminary and postliminary activities, employers and employees may still agree to such compensation

through a contract or collective-bargaining agreement. *Id.* at § 254(b).

In construing the Portal-to-Portal Act, this Court held in 1956 that "activities performed either before or after the regular work shift, on or off the production line," are compensable under the FLSA only if they are "an integral and indispensable part of the principal activities for which covered workmen are employed." *Steiner*, 350 U.S. at 256. Applying that longstanding rule, this Court unanimously held in 2005 that time spent waiting to obtain protective equipment before donning it at the beginning of a shift was not compensable under the FLSA. *See IBP*, 546 U.S. at 40-41. The Department of Labor has also promulgated regulations further clarifying the meaning of "preliminary" and "postliminary" activities. Under those regulations, "checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks" are not compensable under the FLSA when "performed under the conditions normally present." 29 C.F.R. § 790.7(g).

B. Respondents' Complaint and the District Court's Decision.

Respondents Jesse Busk and Laurie Castro are former Integrity employees who were placed by Integrity on temporary assignments working at Amazon warehouses in Nevada filling orders placed by Amazon.com customers. They were paid on an hourly basis by Integrity. At the end of their shifts, Respondents would leave their work stations, punch out on the time clock, and then walk through a security screening located near the exit of the

warehouse. During the screening process, Respondents would remove their wallets, keys, and other items from their pockets, then walk through a metal detector.

In December 2010, Respondents filed a class-action complaint against Integrity in U.S. District Court for the District of Nevada, alleging that Integrity's failure to compensate them for time spent passing through security screenings violated the FLSA and parallel provisions of Nevada law. *See* Amended Complaint, *Busk v. Integrity Staffing Solutions*, No. 2:10-cv-1854 (D. Nev. Dec. 15, 2010).[1] Respondents asserted that the security screenings were "for the benefit of the employer" and were "necessary to the employer's task of minimizing 'shrinkage' or loss of product from warehouse theft." *Id.* ¶ 38. Respondents sought back pay and overtime, as well as double damages on the ground that Integrity's actions were "without substantial justification." *Id.* ¶¶ 29, 40-41.

Integrity filed a motion to dismiss for failure to state a claim, which the district court granted on July 19, 2011. Applying the test set forth by this Court in *Steiner*, 350 U.S. at 255-56, the district court held that time spent in security screenings was not compensable under the FLSA because it was not "an integral and indispensable part of the principal

---

[1] Respondents also alleged that Integrity violated the FLSA and state law by failing to provide a "bona fide" 30-minute meal period. The district court dismissed that claim, Pet.App.28-32, and the Ninth Circuit affirmed, Pet.App.13-17, holding that time spent walking to and from the break room was not compensable under the FLSA.

activity of the employment." Even though the screenings were "mandatory for all employees" and could allegedly take up to 25 minutes, the court found that they were not integral to Respondents' "principal activities as warehouse employees fulfilling online purchase orders." Pet.App.27. The court concluded that security screenings "fall squarely into a non-compensable category of postliminary activities such as checking in and out and waiting in line to do so and 'waiting in line to receive pay checks.'" Pet.App.27-28 (quoting 29 C.F.R. § 790.7(g)).

The district court further noted that "[t]he weight of authority concerning preliminary and postliminary security screenings supports this conclusion." Pet.App.28 & n.2 (citing four cases finding security screening time non-compensable under FLSA). The court emphasized that these precedents "pose difficult hurdles" for Respondents because they all hold that time spent in security screenings is non-compensable under the FLSA even if the employer had a "great" need for the screenings. Pet.App.28.

C. The Ninth Circuit's Decision

Respondents appealed and the Ninth Circuit reversed in relevant part. In an opinion by Judge Thomas issued on April 12, 2013, the court concluded that Respondents had stated a claim for relief under the FLSA based on Integrity's failure to provide compensation for time spent in security screenings. Pet.App.11. The court noted that "Integrity requires the security screenings," and that the screenings are "intended to prevent employee theft—a plausible

allegation since the employees apparently pass through the clearances only on their way out of work, not when they enter." *Id.* The court thus concluded that "the security clearances are necessary to employees' primary work as warehouse employees and done for Integrity's benefit." Pet.App.11-12.

The Ninth Circuit found the cases cited by the district court to be distinguishable because they involved workplaces, such as airports and power plants, in which "everyone who entered had to pass through a security clearance." Pet.App.12. Here, in contrast, the court concluded that the purpose of Integrity's screening process was "to prevent employee theft, a concern that stems from the nature of the employees' work (specifically their access to merchandise)." *Id.*

Integrity filed a timely petition for panel rehearing or rehearing en banc, arguing that the panel's decision misconstrued the Portal-to-Portal Act and conflicted with decisions from other circuits. The Ninth Circuit denied the petition on June 3, 2013. Pet.App.18. On August 12, 2013, Justice Kennedy extended the time for filing this Petition to and including October 3, 2013. *See* No. 13A165.

REASONS FOR GRANTING CERTIORARI

This case presents an ideal opportunity for the Court to resolve a highly consequential two-to-one circuit split over whether time spent in security screenings is compensable under the FLSA, as amended by the Portal-to-Portal Act. That issue is squarely presented, outcome determinative, and of enormous practical importance. Certiorari is warranted to resolve this circuit split and prevent the

Ninth Circuit's expansive interpretation of the FLSA from creating massive retroactive liability for employers and fundamentally upending the careful policy balance struck by Congress.

I. The Ninth Circuit's Decision Is Clearly Wrong And Conflicts With The Decisions Of Two Other Courts Of Appeals.

A. The Ninth Circuit Badly Misconstrued the Portal-to-Portal Act and This Court's Precedents.

Congress enacted the Portal-to-Portal Act in 1947 to repudiate expansive judicial interpretations of the FLSA under which employees could recover back pay and double damages for activities that had nothing to do with their actual job duties. *See* 29 U.S.C. § 251. The relevant provision of the Act expressly excludes two categories of activities from the FLSA's compensation requirements: (1) "walking, riding, or traveling to and from the actual place of performance of the principal activity"; and (2) "activities which are preliminary to or postliminary to [the employee's] principal activity or activities." 29 U.S.C. § 254(a).

In construing the meaning of "preliminary" and "postliminary" activities, this Court has held that an activity is subject to the FLSA only if it is an "integral and indispensable part of the principal activities for which covered workmen are employed." *Steiner*, 350 U.S. at 256. An employee's "principal activities" include "*work of consequence* performed for an employer" and activities that are "'indispensable to the performance of *productive work*.'" 29 C.F.R. § 790.8(a) (emphasis added); *see also IBP*, 546 U.S. at

36 ("[I]n most situations the workday will be defined by the beginning and ending of the primary productive activity."). Thus, preliminary and postliminary activities are compensable under the FLSA only if they are integral and indispensable to the productive work the employee was hired to perform.

Pre- or post-shift security screenings plainly do not meet that standard, as the district court correctly recognized. *See* Pet.App.27-28. Respondents were hired to be warehouse workers, and the "principal activities for which [they] were employed" involved retrieving items from inventory to fill online orders. The security screenings occurred off the warehouse floor *after* Respondents' productive work had been completed, and were in no way "indispensable" to their principal job duties. The Ninth Circuit suggested that the security screenings were compensable under the FLSA because they "stem[] from the nature of the employees' work (specifically their access to merchandise)." Pet.App.12. But Respondents' "work of consequence" and "productive work," *see* 29 C.F.R. § 790.8, involved *filling customer orders*, not some abstract "access to merchandise."

What is more, the Ninth Circuit's reasoning proves far too much: such quintessential preliminary and postliminary activities as the need to shower or change clothes may "stem[] from the nature of the employees' work," and yet such tasks are clearly non-compensable. What matters is not whether the activity merely "stems from" the employees' principal work (a test seemingly designed to impermissibly capture activities that flow from, but are only

tangentially related to, the employees' principal activities), but whether they are "integral and indispensable to the employees' principal productive work.

The Ninth Circuit badly misconstrued the "integral and indispensable" standard to reach its result that security screenings are compensable. The court found that standard to be satisfied here because Integrity "requires" security screenings, which are "done for Integrity's benefit." Pet.App.11-12. To be sure, the screenings are "required" in a broad, but-for sense because Integrity will not employ a worker who refuses to undergo security screenings, any more than other employers might refuse to employ a worker who refuses to stand in line to clock in and out. But the Portal-to-Portal Act requires more than but-for necessity—the question is not simply whether the employer "requires" the activity in question, but whether it is integral to the *principal job duties* the worker is employed to perform. *See Steiner*, 350 U.S. at 256.

This Court has squarely rejected the use of a simple but-for test in determining the scope of the Portal-to-Portal Act. As the Court explained, "the fact that certain preshift activities are necessary for employees to engage in their principal activities *does not* mean that those preshift activities are 'integral and indispensable' to a 'principal activity' under *Steiner*." *IBP*, 546 U.S. at 40-41 (emphasis added). The Court thus concluded that "time spent waiting to don" protective gear before a shift begins "comfortably qualifies" as a non-compensable preliminary activity, even though employees

necessarily had to complete these tasks in order to perform their jobs. *Id.*

Indeed, the Ninth Circuit's approach is the modern analog to the *Mt. Clemens* decision that Congress expressly abrogated in the Portal-to-Portal Act. In *Mt. Clemens*, this Court held that employees were entitled to compensation under the FLSA for "all time during which an employee is *necessarily required* to be on the employer's premises." 328 U.S. at 690-91 (emphasis added). That is strikingly similar to the standard the Ninth Circuit applied in this case—whether the activity in question was "require[d]" by the employer and "done for [the employer's] benefit." Pet.App.11-12. The express purpose of the Portal-to-Portal Act was to *repudiate* the *Mt. Clemens* decision, yet the decision below reads as if *Mt. Clemens* were still governing law.

The Ninth Circuit's interpretation of the Portal-to-Portal Act also conflicts with the Department of Labor's ("DOL's") regulations. Countless employers "require" hourly employees to punch in and out on a time clock, and this task is unquestionably done for the "benefit" of the employer (to ensure accurate recordkeeping and prevent cheating). Thus, under the Ninth Circuit's approach to "preliminary" and "postliminary" activities, time spent waiting to punch the clock would be compensable under the FLSA. But it is well-established under DOL's regulations that "checking in and out and waiting in line to do so" is not covered by the FLSA because it is not integral or indispensable to the employee's actual *job duties*. 29 C.F.R. § 790.7(g). The Ninth Circuit did not even cite this regulation, much less offer a principled

reason for distinguishing between time waiting in a security screening and time waiting to punch the clock at the beginning or end of the day [2]

* * *

In sum, walking through a security screening is no more integral or indispensable to warehouse work than time spent commuting, walking from the parking lot to the workplace, waiting to pick up protective gear, or waiting in line to punch the time clock. All of those activities may be "necessary" in a broad, but-for sense of the word, but none is compensable under the FLSA. The express purpose of the Portal-to-Portal Act was to *exclude* from the FLSA preliminary or postliminary activities that are not integral to the employee's core job functions, and security screenings fall comfortably within that class of activities. *See* Pet.App.27-28 (district court holding that security screenings "fall squarely into a non-compensable category of postliminary activities such as checking in and out"). This Court should not allow the Ninth Circuit to override Congress' explicit policy choice through a cramped construction of "preliminary" and "postliminary" activities.

---

[2] Similarly, time spent walking from the parking lot or factory gate to the employee's work station is certainly "necessary" for an employee to be able to perform her job, but DOL has long recognized that such activities are not compensable under the FLSA. *See* 29 C.F.R. § 790.7(f).

B. The Ninth Circuit's Decision Conflicts With Decisions of the Second and Eleventh Circuits.

The Ninth Circuit is the only federal court to have held that time spent in security screenings is compensable under the FLSA. Although the court attempted to distinguish conflicting authority from the Second and Eleventh Circuits, *see* Pet.App.12, there is no question that those cases are irreconcilable with both the reasoning and outcome of the Ninth Circuit's decision in this case.

1. In *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 593-94 (2d Cir. 2007), the Second Circuit held that time spent by nuclear-plant employees in "ingress and egress security procedures" was not covered by the FLSA. The court acknowledged that these activities were "necessary in the sense that they are required and serve essential purposes of security," but nonetheless concluded that they were "not integral to principal work activities." *Id.* at 593.

The Second Circuit emphasized that "security-related activities" are "modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act, in particular, travel time." *Id.* As the court explained, security screenings are far afield from the types of preliminary and postliminary activities that have been found compensable under the FLSA, such as a butcher sharpening his knife and an x-ray technician powering up and testing the machinery. *Id.* at 592. In each of those situations, the activity is integral to the employee's productive work, as the work *could not be done* without it. But that is not remotely the

case with pre- or post-shift security screenings. Indeed, the Second Circuit could posit only a single, narrow situation in which the FLSA might require compensation for time spent in a security screening: when the employee in question is "responsible for monitoring, testing, and reporting on the plant's infrastructure security." *Id.* at 593 n.5.

The Second Circuit acknowledged that "security measures at sensitive facilities (and elsewhere) are becoming increasingly invasive, layered, and time-consuming," and that such measures "may not have been envisioned" when the FLSA and Portal-to-Portal Act were enacted. *Id.* at 593. But, under the plain text of those statutes, the court had little difficulty concluding that security screenings are not "principal activities of the employment," even though they may "lengthen the trip to the job-site." *Id.* at 594.

In its brief discussion of *Gorman*, the Ninth Circuit claimed that the case was distinguishable because "everyone who entered the workplace had to pass through a security clearance." Pet.App.12. But the Second Circuit's core holding was that security screenings are "*modern paradigms*" of preliminary or postliminary activities because—even though they may be "required" for a particular position—they are inherently distinct from the employees' primary job duties. 488 F.3d at 593-94 (emphasis added). The Second Circuit noted at the very end of its discussion that its holding was bolstered by the fact that "everyone entering the plant" was subject to a security screening. *Id.* at 594. But that fact was not remotely dispositive to the court's decision—after all,

a nuclear plant does not entertain an abundance of non-employee visitors. There is no question that Respondents' FLSA claims would have been dismissed under the Second Circuit's reasoning in *Gorman*.

The Ninth Circuit also asserted that the security screenings in *Gorman* were not put in place because of "the nature of the employees' work." Pet.App.12. That is nonsensical. Employees at the nuclear plant were required to pass through a "radiation detector, x-ray machine, and explosive material detector" before entering *or exiting* the plant. 488 F.3d at 592. The self-evident purpose of those screenings was to prevent employees from smuggling hazardous materials into or out of the site—materials to which the employees only had access because of the "nature" of their work. Unlike the Ninth Circuit, however, the Second Circuit correctly concluded that the FLSA does not apply to such screenings because they are not a consequential component of the plaintiffs' actual job duties.

2. In *Bonilla v. Baker Concrete Construction*, 487 F.3d 1340 (11th Cir. 2007), the Eleventh Circuit similarly held that "time spent going through security screening" was not compensable under the FLSA. The plaintiffs were construction workers at Miami International Airport who "were required to pass through a single security checkpoint" in order to "reach their work sites inside the airport." *Id.* at 1340-41. Like Respondents in this case, the plaintiffs argued that they were entitled to compensation for this time because the security screenings were "necessary" "in order to do their jobs." *Id.* at 1344.

The Eleventh Circuit squarely rejected that interpretation of the FLSA and Portal-to-Portal Act. As the court explained, "[i]f mere causal necessity was sufficient to constitute a compensable activity, all commuting would be compensable because it is a practical necessity for all workers to travel from their homes to their jobs." *Id.* The court refused to allow the plain text of the Portal-to-Portal Act to be "swallowed by an all-inclusive definition of 'integral and indispensable.'" *Id.* The court also noted that the security screenings were not for the "benefit of the employer" because they were "mandated by the [Federal Aviation Administration]," rather than the employer. *Id.* at 1345.

The Ninth Circuit seized on the latter fact, finding *Bonilla* to be distinguishable because "the Federal Aviation Administration mandated the security process." Pet.App.12. But nothing in the text of the Portal-to-Portal Act creates a separate rule for preliminary or postliminary activities that are mandated by the government. Under 29 U.S.C. § 254(a) and this Court's precedents, the sole inquiry is whether the activity was integral and indispensable to the employee's principal job duties. *See Steiner*, 350 U.S. at 256. If the activity is integral and indispensable, it is compensable under the FLSA even if it is also mandated by government regulation. If the activity is not integral and indispensable, it is not compensable, again without regard to whether it is mandated by government regulation. Security screenings of construction workers or warehouse workers plainly do not meet

the one relevant test, as the Eleventh Circuit, but not the Ninth Circuit, correctly held.[3]

The Ninth Circuit's attempted distinction of *Bonilla* would also lead to bizarre results. Under the court's reasoning, time spent in security screenings would be compensable under the FLSA for a worker in an Amazon.com warehouse but not for a worker at a cargo warehouse located on airport grounds. That makes no sense. If a security screening is unrelated to the specific tasks for which a worker is employed, then it is not subject to the FLSA, regardless of whether the screening was the product of a government mandate or a private company's own prerogative.

* * *

As the law currently stands, security screening time is compensable under the FLSA in the Ninth Circuit, but not in the Second and Eleventh Circuits.

---

[3] At least three district courts have applied *Bonilla* to privately imposed security screenings, holding that the fact the screenings in *Bonilla* were government-imposed was *not* a plausible basis for distinguishing the case. *See Sleiman v. DHL Express*, No. 09-0414, 2009 WL 1152187, at *5-*6 (E.D. Pa. Apr. 27, 2009) ("security screening procedures do not constitute work, and are not integral and indispensable to principal activities," regardless of whether they imposed by "federal mandate" or a private company); Mem. & Order at 7, *Jones v. Best Buy Co.*, No. 12-cv-95 (D. Minn. Apr. 12, 2012) (noting that the decision in *Bonilla* "[did] not turn on the source of the mandate,' and that the reasoning of *Bonilla* and *Gorman* applies with full force to "employer-driven security measures"); *Anderson v. Perdue Farms*, 604 F. Supp. 2d 1339, 1359 (M.D. Ala. 2009) (holding, based on *Bonilla* and *Gorman*, that employees of a privately owned chicken plant were "not entitled to compensation for time spent clearing security").

A two-to-one split over the meaning of a federal statute would be an intolerable state of affairs under any circumstances, but the need for a uniform rule in this case is imperative given that numerous employers—including Integrity—operate within jurisdictions on both sides of the split. Because of the availability of nationwide FLSA class actions, the most plaintiff-friendly jurisdiction will effectively be able to establish the substantive law that governs the entire country. As explained below, plaintiffs are already flocking to the Ninth Circuit to obtain a favorable forum for FLSA claims seeking back pay for time spent in security screenings, including with respect to workplaces located outside of the Ninth Circuit.

II. The Ninth Circuit's Erroneous Decision Will Have Far-Reaching Implications For Employers, And Has Already Spawned Class-Action Suits Across The Country.

A. In the post-9/11 world, security screenings have become ubiquitous in the American workplace, and are routinely required for employees working in skyscrapers, corporate campuses, federal, state, and local government offices, courthouses, sports arenas, museums, airports, power plants, theme parks, and countless other places. These screenings take a variety of different forms. Some are mandatory for all persons entering a building, while others might involve only random checks. Some apply only upon entering a building, while others apply on both entry and exit, *see Gorman*, 488 F.3d at 592, or exit only. Some involve walking through a metal detector while others might involve only a "bag check." Some are

primarily about keeping dangerous items out, while others are primarily about keeping valuable materials in. But the one thing all of these procedures have in common is that, until the Ninth Circuit's decision in this case, no court had *ever* suggested that time spent in security screenings was compensable under the FLSA.

Before the Ninth Circuit's decision, the existence (and nature) of a security screening process was just one factor that employees would consider in choosing whether to take a particular job. Prospective employees would simply weigh that consideration against other factors—such as pay, benefits, work schedule, and distance from home—in deciding whether to take the job. Indeed, an employer that requires security screenings is materially indistinguishable from an employer that locates its business in a congested area with frequent traffic jams. Both circumstances may result in minor inconveniences to employees, but neither is remotely the type of issue that should be subject to mandatory, government-imposed compensation.

Indeed, as Justices Frankfurter and Burton noted in their dissent in *Mt. Clemens*, the "obvious, long established, and simple way" to compensate employees for preliminary and postliminary activities "is to recognize those activities *in the rate of pay* for the particular job." 328 U.S. at 697 (emphasis added). The Portal-to-Portal Act expressly recognizes that the default rule—that preliminary and postliminary activities are not compensable—may be altered through "an express provision of a written or nonwritten contract between [an] employee, his

agent, or collective-bargaining representative and his employer." 29 U.S.C. § 254(b).

The Ninth Circuit's decision fundamentally upends the careful policy balance struck by Congress in the FLSA and Portal-to-Portal Act, and opens employers up to billions of dollars in retroactive damages. In the wake of the *Mt. Clemens* decision, Congress unequivocally *rejected* the notion that the FLSA applies to all time spent on the employer's premises or all tasks "required" by the employer. Instead, Congress made clear that the FLSA's basic standards apply only to tasks that are integral and indispensable to employees' *productive work*. All other activities would not be subject to the FLSA and would instead be addressed, if at all, on an employer-by-employer basis through contracts or collective bargaining. The Ninth Circuit's decision flouts Congress' express policy goals, and converts what had been a balanced regulatory scheme into a windfall for employees and plaintiffs' lawyers.

B. Predictably, the aftermath of the Ninth Circuit's decision in this case has resembled the fallout from the *Mt. Clemens* decision. In the wake of *Mt. Clemens*, the courts were flooded with claims by employees seeking billions of dollars of back pay under the FLSA for preliminary and postliminary tasks that had nothing to do with their actual job duties. *See supra* pp. 6-8. Just six months later, Congress enacted the Portal-to-Portal Act to repudiate that decision, finding that the FLSA, as construed in *Mt. Clemens*, had resulted in "wholly unexpected liabilities, immense in amount and retroactive in operation," that threatened to "give

rise to great difficulties in the sound and orderly conduct of business and industry." 29 U.S.C. § 251(a). The Ninth Circuit's decision in this case has *already* had the same effect, spawning a number of nationwide class-action suits that seek to hold employers retroactively liable for back pay, overtime, and double damages based on the failure to compensate employees for time spent in security screenings at worksites both within and outside the Ninth Circuit.

In September 2012, CVS Pharmacy was sued by a class of employees at its regional distribution centers, who alleged that CVS's failure to pay them for time spent in post-shift security screenings violated the FLSA. Relying on *Gorman* and *Bonilla*, the district court had initially dismissed the plaintiffs' FLSA claims. *See Ceja-Corona v. CVS*, No. 12-1868, 2013 WL 796649, at *9 (E.D. Cal. Mar. 4, 2013). But the district court reversed itself in the wake of the Ninth Circuit's decision and allowed the plaintiffs' claims to proceed. *See* 2013 WL 3282974 (E.D. Cal. June 27, 2013). The plaintiffs have now filed an amended complaint in which they seek damages on behalf of a nationwide class of employees at CVS distribution centers. *See* First Amended Class Action Complaint ¶¶ 14-20, 65-73, *Ceja-Corona v. CVS*, No. 1:12-cv-1868 (E.D. Cal. July 15, 2013).

Similarly, Apple requires its hourly retail employees to undergo "bag searches and clearance checks when they leave for their meal breaks and after they have clocked out at the end of their shifts." Class Action Complaint ¶ 4, *Frlekin v. Apple Inc.*, No. 3:13-cv-3451 (N.D. Cal. July 25, 2013). Just three

months after the Ninth Circuit's decision in this case, Apple was sued by a class of tens of thousands of current and former employees seeking compensation under the FLSA for time spent in those screenings. *See id.* ¶¶ 51-60. Unsurprisingly, the plaintiffs brought their suit in a district court within the Ninth Circuit, even though one of the lead plaintiffs and three of the four attorneys are from New York.

In the last two months, plaintiffs have also brought at least four class actions against Amazon.com (two of which involve nationwide classes), alleging violations of the FLSA and seeking compensation for time spent in post-shift security screenings.[4] And, in this very case, Respondents have now added Amazon.com as a defendant and expanded their complaint from warehouses in Nevada to "all Amazon.com locations throughout the United States." Second Amended Class Action Complaint ¶ 17, *Busk v. Integrity Staffing Solutions*, No. 2:10-cv-1854 (D. Nev. Aug. 28, 2013). For Integrity and Amazon.com alone, Respondents' counsel has boasted that the total number of plaintiffs "could approach 100,000 members," and

---

[4] *See* Class Action Complaint, *Vance v. Amazon.com*, No. 3:13-cv-765 (W.D. Ky. Aug. 1, 2013); Class Action and FLSA Collective Action Complaint, *Allison v. Amazon.com*, No. 2:13-cv-1612 (W.D. Wash. Sept. 6, 2013); Collective Action Complaint, *Suggars v. Amazon.com*, No. 3:13-cv-906 (M.D. Tenn. Sept. 9, 2013); Collective Action and Class Action Complaint, *Johnson v. Amazon.com*, No. 1:13-cv-153 (W.D. Ky. Sept. 17, 2013). Integrity is also a named defendant in the *Allison* case.

"'we're talking hundreds of millions of dollars'" in damages.[5]

Thus, although the decision below reflects only the mistaken judgment of a single circuit, it is already having a nationwide effect. That unfortunate dynamic necessitates this Court's review.

* * *

The Portal-to-Portal Act was enacted to override judicial decisions that had applied the FLSA to activities far beyond anything Congress had contemplated. Contrary to the text and purpose of the statute—as well as the decisions of two other circuits—the Ninth Circuit's decision in this case threatens to saddle employers across the country with massive retroactive liability for activities that have long been treated as non-compensable under the FLSA. It may be "possible for an entire industry to be in violation of the [FLSA] for a long time" without anyone noticing, but the "more plausible hypothesis" is that the industry "has been left alone because the character of its compensation system" is not unlawful. *Yi v. Sterling Collision Centers*, 480 F.3d 505, 510 (7th Cir. 2007) (Posner, J.). Certiorari is warranted to reestablish a uniform rule and to correct the Ninth Circuit's deeply flawed interpretation of "preliminary" and "postliminary" activities under the Portal-to-Portal Act.

---

[5] Kase, *Amazon Workers Want Pay for Time Spent at Security Checkpoint* (Apr. 25, 2013), *at* http://blogs.lawyers.com/2013/04/amazon-workers-want-pay-for-time-at-security/.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

NEIL M. ALEXANDER
RICK D. ROSKELLEY
ROGER L. GRANDGENETT II
CORY GLEN WALKER
LITTLER MENDELSON
3960 Howard Hughes
Parkway, Suite 300
Las Vegas, NV 89169
(702) 862-8800

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

October 3, 2013

APPENDIX

TABLE OF APPENDICES

Appendix A

Opinion of the United States Court of Appeals for the Ninth Circuit, *Busk v. Integrity Staffing Solutions, Inc.*, No. 11-16892 (Apr. 12, 2013) App-1

Appendix B

Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing and Petition for Rehearing En Banc, *Integrity Staffing Solutions, Inc.*, No. 11-16892 (June 3, 2013)..... App-18

Appendix C

Order of the United States District Court for the District of Nevada Dismissing Plaintiffs' First Amended Complaint, *Busk v. Integrity Staffing Solutions, Inc.*, No. 10-cv-1854 (July 19, 2011)..... App-19

Appendix D

Relevant Statute & Regulation

29 U.S.C. § 254 ..... App-36

29 C.F.R. § 790.7 ..... App-39

Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11-16892

JESSE BUSK; LAURIE CASTRO, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

INTEGRITY STAFFING SOLUTIONS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Nevada
No. 2:10-cv-01854-RLH-RJJ
Roger L. Hunt, Senior District Judge, Presiding

Argued and Submitted
February 12, 2013—Stanford, California
Filed April 12, 2013

Before: Jerome Farris, Sidney R. Thomas, and N. Randy Smith, Circuit Judges.
Opinion by Judge Thomas

OPINION

SUMMARY*

Labor Law

The panel affirmed in part and reversed in part the district court's dismissal of warehouse workers' claims for unpaid wages under the Fair Labor Standards Act and Nevada state law.

The panel reversed the dismissal of state law claims on the basis that they would be certified using different class certification procedures than the federal wage-and-hour claims. Agreeing with other circuits, the panel held that a FLSA collective action and a state law class action are not inherently incompatible as a matter of law even though plaintiffs must opt into a collective action under the FLSA but must opt out of a class action under Federal Rule of Civil Procedure 23.

The panel held that the workers stated an unpaid wages claim under the FLSA for undergoing a security screening meant to prevent employee theft. The panel concluded that the workers sufficiently alleged that this "postliminary" activity was "integral and indispensable" to their principal activities.

The panel affirmed the dismissal of a claim under the FLSA for shortened lunch periods. It remanded for the district court to consider the argument that the workers stated a state law claim

---

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

regarding lunch periods because Nevada defines "work" differently than federal law.

COUNSEL

Mark R. Thierman, Jason J. Kuller, Joshua D. Buck (argued), Thierman Law Firm, P.C., Reno, Nevada, for Plaintiffs-Appellants.

Rick D. Roskelley (argued), Roger L. Grandgenett II, Cory Glen Walker, Littler Mendelson, P.C., Las Vegas, Nevada, for Defendant-Appellee.

OPINION

THOMAS, Circuit Judge:

In this appeal, we consider whether the district court erred in dismissing the plaintiffs' state law claims for unpaid wages because those claims would be certified using different class certification procedures than their federal wage and hour claims. We also consider whether the plaintiffs have alleged plausible claims for unpaid wages under federal and Nevada law for undergoing a security screening meant to prevent employee theft and for unpaid lunch periods shortened by five-minute walks to the cafeteria. We affirm the district court in part, reverse in part, and remand for further proceedings.

I.

Plaintiffs Jesse Busk and Laurie Castro are former employees of Integrity Staffing Solutions, Inc., which provides warehouse space and staffing to clients such as Amazon.com.[1] Busk and Castro

---

[1] All facts are drawn from the first amended complaint. In considering an appeal from a district court order granting a

worked as hourly employees at warehouses in Las Vegas and Fernley, Nevada, respectively, filling orders placed by Amazon.com customers. In 2010, Busk and Castro sued Integrity on behalf of a putative class of workers in both warehouses, claiming violations of the Fair Labor Standards Act (FLSA) and Nevada labor laws.

Busk and Castro alleged Integrity violated federal and state labor laws by requiring them to pass through a security clearance at the end of each shift, for which they were not compensated. Employees waited up to 25 minutes to be searched; removed their wallets, keys, and belts; and passed through metal detectors. The plaintiffs alleged the clearances were "necessary to the employer's task of minimizing 'shrinkage' or loss of product from warehouse theft."

The plaintiffs also sought compensation under FLSA and Nevada law for their entire 30-minute unpaid lunch periods because they spent up to 10 minutes of the meal period "walking to and from the cafeteria and/or undergoing security clearances." They said it took them about five minutes after punching out "to walk to the facility cafeteria and/or pass through security clearances" and "approximately five minutes to walk from the cafeteria to the time keeping system to clock back in." Additionally, managers would frequently "remind"

---

motion to dismiss, we accept all factual allegations of the complaint as true, and we construe the facts in the light most favorable to the plaintiff. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1140 (9th Cir. 2012).

workers to "finish their meal period quickly so that they would clock back in on time."

The district court granted Integrity's motion to dismiss the amended complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The court held that the time spent clearing security was not compensable under FLSA, relying on out-of-circuit cases finding the time employees spent passing through security screenings noncompensable. The court also held that the plaintiffs' allegations about shortened meal periods did not state a claim under FLSA because the plaintiffs did not allege that they performed "any duty related to their job as warehouse workers" during their lunch breaks.

The district court also held that the state law claims "must be dismissed" due to "conflicting" class certification mechanisms, namely that while plaintiffs must opt into a collective action under FLSA, plaintiffs must opt out of a class action under Federal Rule of Civil Procedure 23. Alternatively, the court dismissed the state claims on the merits. It held that since the claims were based entirely on the security clearance and lunch allegations, the "Plaintiffs have failed to allege fact scenarios that would support a valid claim" under Nevada law.

II

We review *de novo* the district court's conclusion that a FLSA collective action and state law class action are inherently incompatible as a matter of law. *See Miranda v. Anchondo*, 684 F.3d 844, 849 (9th Cir. 2011) (questions of statutory construction and interpretation reviewed *de novo*). We agree with all other circuits to consider the issue that such actions

can peacefully coexist. Therefore, the district court erred in dismissing the state law claims based on a perceived conflict.

Under FLSA, a potential plaintiff does not benefit from (and is not bound by) a judgment unless he or she "affirmatively 'opts in'" to the lawsuit. *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 862 (9th Cir. 1977), *overruled on other grounds by Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165 (1989); *see also* 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."). This rule is in contrast to a typical Rule 23 class action, where a potential plaintiff must opt out to be excluded from the class. *See* Fed. R. Civ. P 23(c)(2)(B)(v) ("the court will exclude from the class any member who requests exclusion"). Although some district courts have held that a FLSA collective action cannot be brought in the same lawsuit as a state-law class action based on the same underlying allegations,[2] all circuit courts to consider the issue have held that the different opting mechanisms do not require dismissal of the state claims. *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 253–62 (3d Cir. 2012); *Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 971, 976–79 (7th Cir. 2011); *Shahriar v. Smith & Wollensky Rest.*

---

[2] *See, e.g., Ellis v. Edward D. Jones & Co.*, 527 F Supp. 2d 439. 452 (W.D. Pa. 2007); *Williams v. Trendwest Resorts, Inc.*, No. 2:05-CV-0605, 2007 WL 2429149, at *3–4 (D. Nev. Aug. 20, 2007); *Otto v. Pocono Health Sys.*, 457 F. Supp. 2d 522, 524 (M.D. Pa. 2006); *cf. Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 469–70 (N.D. Cal. 2004). *Knepper v. Rite Aid Corp.*, 675 F.3d 249 (3d Cir. 2012), overruled *Ellis* and *Otto*.

Grp., 659 F.3d 234, 247–49 (2d Cir. 2011); *Lindsay v. Gov't Emps. Ins. Co.*, 448 F.3d 416, 424 (D.C. Cir. 2006).

Our sister circuits have correctly reasoned that FLSA's plain text does not suggest that a district court must dismiss a state law claim that would be certified using an opt-out procedure. Its opt-in requirement extends only to "any such action"—that is, a FLSA claim. *See* 29 U.S.C. § 216(b); *Knepper*, 675 F.3d at 259–60 (noting Section 216(b) "explicitly limits its scope to the provisions of the FLSA, and does not address state-law relief"); *Ervin*, 632 F.3d at 977 ("Nothing" about FLSA's text "suggests that the FLSA is not amenable to state-law claims for related relief in the same federal proceeding."). FLSA also expressly permits more protective state labor laws. *See* 29 U.S.C. § 218(a) ("No provision of this chapter shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter "). This savings clause provides further evidence that a federal lawsuit combining state and federal wage and hour claims is consistent with FLSA. *See Ervin*, 632 F.3d at 977; *Shahriar*, 659 F.3d at 247–48.

Nor does the legislative history of Section 216(b) support the view of some district courts that allowing both actions to proceed simultaneously "would essentially nullify Congress's intent in crafting Section 216(b) and eviscerate the purpose of Section 216(b)'s opt-in requirement." *Otto v. Pocono Health*

Sys., 457 F Supp. 2d 522, 524 (M.D. Pa. 2006), *overruled by Knepper*, 675 F.3d at 253–62. We agree with the Third Circuit that the "full legislative record casts doubt" on the contention that Section 216(b) was intended to eliminate opt-out class actions. *Knepper*, 675 F.3d at 260; *see also Ervin*, 632 F.3d at 977–78; *Shahriar*, 659 F.3d at 248. When Congress created Section 216(b)'s opt-in requirement as part of the Portal-to-Portal Act of 1947, it was responding to concerns about third parties filing "representative" FLSA actions on behalf of disinterested employees. *See Hoffman-La Roche*, 493 U.S. at 173. Accordingly, it amended FLSA "for the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions." *See id.*

This purpose does not evince an intent to eliminate opt-out class actions for state wage and hour claims brought in federal court. Even if it did, Congress has expressed a contrary intent in the Class Action Fairness Act of 2005, which confers federal jurisdiction over class actions where certain diversity and amount-in-controversy requirements are met. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4. Because the Class Action Fairness Act provides that federal courts should exercise jurisdiction over certain class actions (including those alleging violations of state wage and hour laws), and these class actions are certified pursuant to Rule 23's opt-out procedure, we cannot conclude that Congress intended such claims be

dismissed simply because they were brought in conjunction with FLSA claims.[3]

Integrity argues that allowing both classes to proceed simultaneously would cause "unnecessary confusion" for potential class members who would receive notices "stating both that they must opt in to have their compensation issues adjudicated and that they must opt out to avoid having their compensation issues adjudicated." While we do not minimize this practical concern, we agree with the Seventh Circuit that district courts should be able to "work[] out an adequate notice in this type of case." *Ervin*, 632 F.3d at 978. Furthermore, "if these actions were to proceed separately—the FLSA in federal court and the state-law class action in state court—an entirely different and potentially worse problem of confusion would arise, with uncoordinated notices from separate courts peppering the employees." *Id.*

---

[3] Integrity also argues that because an opt-out class is likely to be much larger than the opt-in class, the district court would be in the "peculiar position of exercising supplemental jurisdiction in a situation where the state law claims would be far more prominent and controlling than the federal." But here jurisdiction over the Nevada claims is premised not on supplemental jurisdiction under 28 U.S.C. § 1367 but on 28 U.S.C. § 1332(d), as amended by the Class Action Fairness Act. In any case, all circuit courts to consider the issue have rejected the argument that the larger size of a state law class alone is reason for a district court not to exercise supplemental jurisdiction. *See Shahriar*, 659 F.3d at 248–49; *Ervin*, 632 F.3d at 979–81; *Lindsay*, 448 F.3d at 424–25. This court has held the same in *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 760–62 (9th Cir. 2010), though that decision was vacated on other grounds, 132 S. Ct. 74 (2011).

In sum, we agree with the other circuits to consider the issue that the fact that Rule 23 class actions use an opt-out mechanism while FLSA collective actions use an opt-in mechanism does not create a conflict warranting dismissal of the state law claims.

III

Turning to the merits, we review *de novo* a district court's dismissal of a complaint for failure to state a claim under Rule 12(b)(6). *N.M. State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1094 (9th Cir. 2011). Accepting the plaintiffs' allegations as true and construing them in the light most favorable to plaintiffs, we may affirm a dismissal only if the complaint fails to state a claim for relief that is plausible on its face. *Id.* Applying this standard, we hold that the district court erred in holding that the plaintiffs failed to state a claim under FLSA for passing through security clearances at the end of the day. But, under the facts alleged, we affirm its dismissal of the claim for shortened lunch periods.

A

FLSA, as amended by the Portal-to-Portal Act of 1947, generally precludes compensation for activities that are "preliminary" or "postliminary" to the "principal activity or activities" that the employee "is employed to perform." 29 U.S.C. § 254(a). But preliminary and postliminary activities are still compensable under the Portal-to-Portal Act if they are "integral and indispensable" to an employee's principal activities. *Steiner v. Mitchell*, 350 U.S. 247, 332 (1956) (changing clothes and showering were

"integral and indispensable" to producing batteries). To be "integral and indispensable," an activity must be (1) "necessary to the principal work performed" and (2) "done for the benefit of the employer." *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902–03 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005).

In *Alvarez*, we held that putting on and taking off protective gear was necessary to the principal work of employees at a meat packing plant because the gear was required by the employer's rules, by federal regulators, and by the "'nature of the work.'" 339 F.3d at 903 (quoting 29 C.F.R. § 790.8(c) n.65). Moreover, the donning and doffing benefited the employer by preventing "workplace injury and contamination." *Id.*; *see also Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 911 (9th Cir. 2004) (donning and doffing uniforms was compensable when company required employees to change on premises to avoid contaminating silicon chips manufactured there). But in *Bamonte v. City of Mesa*, 598 F.3d 1217 (9th Cir. 2010), we held that donning and doffing police uniforms was not necessary to police officers' principal work because they could change at home and chose to do so at work for their own benefit. *Id.* at 1225–26.

Here, Busk and Castro have alleged that Integrity requires the security screenings, which must be conducted at work. They also allege that the screenings are intended to prevent employee theft—a plausible allegation since the employees apparently pass through the clearances only on their way out of work, not when they enter. As alleged, the security clearances are necessary to employees' primary work

as warehouse employees and done for Integrity's benefit. Assuming, as we must, that these allegations are true, the plaintiffs have stated a plausible claim for relief.

In holding otherwise, the district court relied upon out-of-circuit cases holding that time spent clearing security was not compensable under the Portal-to-Portal Act. But these cases are distinguishable because, in these cases, everyone who entered the workplace had to pass through a security clearance. In *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007), the Second Circuit held that security procedures at a nuclear power plant were part of noncompensable travel time under 29 U.S.C. § 254(a)(1) in part because the "security measures at entry are required (to one degree or another) for everyone entering the plant," including visitors. *Id.* at 594. In *Bonilla v. Baker Concrete Construction Co.*, 487 F.3d 1340 (11th Cir. 2007), the Eleventh Circuit held that construction workers employed by a subcontractor to work on an airport construction project were not entitled to compensation for passing through a security clearance. *Id.* at 1345. Because the Federal Aviation Administration mandated the security process, the court held that the screening did not benefit the employer. *Id.*

Gorman and *Bonilla* do not concern a security screening put in place because of the nature of the employee's work. But here Integrity allegedly requires the screening to prevent employee theft, a concern that stems from the nature of the employees' work (specifically, their access to merchandise).

Therefore, the district court erred in assuming *Gorman* and *Bonilla* created a blanket rule that security clearances are noncompensable instead of assessing the plaintiffs' claims under the "integral and indispensable" test.

Because we hold that the plaintiffs have stated a valid claim for relief under FLSA for the time spent passing through security clearances, we also reverse the district court's dismissal of the parallel state law claim.

B

The district court also held that the plaintiffs failed to state a claim under FLSA for their shortened lunch periods. Under the facts as alleged, we agree.

FLSA does not require compensation for an employee's lunch period, but an "employee cannot be docked for lunch breaks during which he is required to continue with any duties related to his work." *Brennan v. Elmer's Disposal Serv., Inc.*, 510 F.2d 84, 88 (9th Cir. 1975); *see also* 29 C.F.R. § 785.19 (providing that an employee must be "completely relieved from duty for the purposes of eating regular meals").[4] An "employee is not relieved if he is

---

[4] Some circuits have declined to defer to 29 C.F.R. § 785.19's "completely relieved from duty" language or interpreted it to mean that an employee is entitled to compensation for a meal period only if he or she "predominately benefits" from the meal period. *See Roy v. Cnty. of Lexington*, 141 F.3d 533, 544–45 (4th Cir. 1998); *Bernard v. IBP, Inc. of Neb.*, 154 F.3d 259, 264–65 (5th Cir. 1998); *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 64–65 (2d Cir. 1997); *Leahy v. City of Chicago*, 96 F.3d 228, 230 n.2 (7th Cir. 1996); *Henson v. Pulaski Cnty. Sheriff*

required to perform any duties, whether active or inactive, while eating." 29 C.F.R. § 785.19. For example, "an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating." *Id.*

Here, Busk and Castro alleged they were not "completely relieved from duty" because by placing the time clocks far from the lunchroom, Integrity forced upon them the "duty to walk to the lunch room in order to eat lunch." But the district court correctly held that walking to the lunchroom is not a work duty. Walking to the lunchroom is not necessary to the plaintiffs' principal work as warehouse employees. Moreover, though the Portal-to-Portal Act does not clearly preclude compensation for walking to the lunchroom, as it only expressly applies to walking before the workday starts and after it ends,[5] it would be incongruous to preclude compensation for walking

---

Dep't, 6 F.3d 531, 534–35 (8th Cir. 1993). *But see Kohlheim v. Glynn Cnty.*, 915 F.2d 1473, 1477 (11th Cir. 1990) (applying "completely relieved from duty" standard). The distinction between the "completely relieved from duty" and "predominant benefit" standards does not matter for this case, which turns on whether the activities at issue are compensable "work."

[5] The Act precludes compensation for "walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and .which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a).

into work on the employer's premises, but require it for walking to the lunchroom.[6]

Busk and Castro also argue they are entitled to compensation for their entire 30-minute lunch periods because supervisors would frequently "remind" workers to "finish their meal period quickly so that they would clock back in on time." They rely upon cases noting that "very frequent interruptions" might make meal periods compensable. *See Roy v. Cnty. of Lexington*, 141 F.3d 533, 546 (4th Cir. 1998). But these cases concern whether employees are entitled to compensation for lunch periods when they remain "on call." They use the term "interruptions" to refer to instances where the employee has to resume a work duty—for instance, when emergency medical service employees fielded emergency calls, *id.*, or maintenance workers responded to maintenance problems, *Bernard v. IBP, Inc. of Neb.*, 154 F.3d 259, 265 (5th Cir. 1998). That supervisors may have "interrupted" Busk and Castro in another sense of the word does not make their lunch periods compensable absent any claim that they performed a work duty.

Finally, the first amended complaint alleges that employees had to pass through a security clearance on their way to the lunchroom. Assuming that the time passing through the security clearance on the

---

[6] Busk and Castro did not claim the walks deprived them of adequate time to eat lunch. We express no view on whether such a claim is cognizable under FLSA, nor on whether the plaintiffs could amend their complaint to state a valid claim under FLSA. We leave that to the district court's consideration on remand.

way to lunch constitutes compensable work, the time alleged in this case is *de minimis*. *See Lindow v. United States*, 738 F.2d 1057, 1062–64 (9th Cir. 1984) (discussing *de minimis* exception). As alleged in the first amended complaint, the walk to and from the cafeteria takes "approximately five minutes" each way, though employees pass through security only on their way to the cafeteria, not on the return trip. The relatively minimal time expended on the clearance in this context differs from the 25-minute delay alleged for employees passing through security at day's end. Therefore, the district court correctly dismissed this claim under Rule 12(b)(6).[7]

The plaintiffs also argue that even if the district court correctly dismissed their FLSA claim relating to the shortened lunch periods, it should not have dismissed their state law claim because Nevada law would require compensation even when federal law does not.

Nevada law requires that an employer provide a half-hour meal break if it employs a worker for a continuous eight-hour period. Nev. Rev. Stat. § 608.019. The law provides, "No period of less than 30 minutes interrupts a continuous period of work for the purposes of this subsection." *Id.* But there is no private right of action to enforce this section. The Nevada Legislature has entrusted the enforcement of this statute to the state Labor Commissioner by

---

[7] Because we affirm the district court's holding that Busk and Castro have not alleged they were required to perform a work duty during lunch, we need not review its alternative justification that the time spent walking to the cafeteria was *de minimis*.

expressly providing that the "Labor Commissioner or the representative of the Labor Commissioner shall cause the provisions of NRS 608.005 to 608.195, inclusive, to be enforced." Nev. Rev. Stat. § 608.180; *see also Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96, 102 (Nev. 2008) (holding there was no implied private right of action to enforce Nev. Rev. Stat. § 608.160 when the "Legislature has expressly ordered the Labor Commissioner to enforce that statute").

Nevada Revised Statute § 608.140 does provide a private right of action to recoup unpaid wages. *Baldonado*, 194 P.3d at 104 n.33. Thus, the district court correctly focused on whether Busk and Castro alleged they were required to "work" during their lunch periods. However, the plaintiffs raised for the first time on appeal their argument that Nevada defines "work" differently than federal law, such that their lunch periods might be compensable under state law even if they were not compensable under federal law. Because the district court has not considered this argument, we remand for it to do so in the first instance. *Cf. Sun v. Taiwan*, 201 F.3d 1105, 1110 (9th Cir. 2000) (remanding for district court to consider new theory of negligence raised for first time on appeal).

AFFIRMED IN PART; REVERSED IN PART; REMANDED. Each party shall bear its own costs on appeal.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 11-16892

JESSE BUSK; LAURIE CASTRO, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v

INTEGRITY STAFFING SOLUTIONS, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Nevada
No. 2:10-cv-01854-RLH-RJJ

Filed June 3, 2013

Before: Farris, Thomas, and N.R. Smith, Circuit Judges.

ORDER

The panel has unanimously voted to deny the petition for rehearing.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P 35(b).

The petition for rehearing and the petition for rehearing en banc are denied.

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. 2:10-cv-01854-RLH-RJJ

JESSE BUSK and LAURIE CASTRO,
individually and on behalf of themselves
and all others similarly situated,

Plaintiffs,

v.

INTEGRITY STAFFING SOLUTIONS, INC.
and DOES no. 1 through 50, inclusive,

Defendant.

Filed July 19, 2011
(Motion to Dismiss—#16)

ORDER

Before the Court is Defendant Integrity Staffing Solutions' ("Integrity") Motion to Dismiss Plaintiffs' First Amended Complaint (#16, filed Jan. 18, 2011). The Court has also considered Plaintiffs Jesse Busk and Laurie Castro's Opposition (#17, filed Feb. 4, 2011), and Integrity's Reply (#18, filed Feb. 14).

BACKGROUND

This case arises out of Plaintiffs' allegations that Integrity violated several state and federal statutes by withholding wages from Plaintiffs and other Integrity employees whom Plaintiffs allege are a

class of similarly situated individuals. Defendant Integrity sub-contracts hourly employees in warehouses throughout the United States. Plaintiffs are former employees of Integrity. Plaintiffs describe themselves as warehouse employees who fulfilled orders made by Amazon.com customers. (Dkt. #11, Am. Compl. ¶ 13.) Plaintiffs allege that they and other Integrity employees were routinely required to participate in security check activities while "off-the-clock." Plaintiffs contend that they were not properly compensated for these security checks, which could last up to 25 minutes after their shift. Plaintiffs further allege that they and other Integrity employees were not properly compensated for up to one-third of their 30-minute meal period. Specifically, they claim they were required to walk long distances to clock out and clock back in, which allegedly diminished their meal period by as much as 10 minutes (five minutes each way). Plaintiffs bring this class action suit against Integrity to recover unpaid wages and overtime, liquidated damages, and attorneys' fees and costs under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-216, and Nevada labor law, NRS §§ 608.018, 608.019, and 608.030.

Plaintiffs filed their original Complaint (#1) on October 22, 2010. Integrity filed a Motion to Dismiss (#6) and Plaintiffs subsequently filed a Notice of Non-Opposition (#8) informing Integrity that an amended complaint would be filed. Plaintiffs filed the Amended Complaint (#11) on December 15, prior to the Court's dismissal of the original complaint on January 7, 2011. (Dkt. #15, Order.) Integrity has now

filed a second motion to dismiss. For the reasons discussed below, the Court grants Integrity's motion.

DISCUSSION

I. Motion to Dismiss the First Amended Complaint

A. Legal Standards

A court may dismiss a plaintiffs complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P 12(b)(6). A properly pled complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P 8(a)(2); *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed factual allegations, it demands "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009) (citing *Papasan v. Allain,* 478 U.S. 265, 286 (1986)). "Factual allegations must be enough to rise above the speculative level." *Twombly,* 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Iqbal,* 129 S. Ct. at 1949 (internal citation omitted).

In *Iqbal,* the Supreme Court recently clarified the two-step approach district courts are to apply when considering motions to dismiss. First, a district court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Id.* at 1950. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.* at 1949. Second, a district court must consider whether the factual

allegations in the complaint allege a plausible claim for relief. *Id.* at 1950. A claim is facially plausible when the plaintiff's complaint alleges facts that allows the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 1949. Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged—but not shown—that the pleader is entitled to relief." *Id.* (internal quotation marks omitted). When the claims in a complaint have not crossed the line from conceivable to plausible, plaintiffs complaint must be dismissed. *Twombly,* 550 U.S. at 570.

B. Analysis

Integrity raises four arguments in its motion. First, Integrity argues that Plaintiffs consented to dismissal of the first amended complaint. Second, Integrity asserts that Plaintiffs' claims seeking class treatment under state labor law are preempted by their class claims asserted under the FLSA. Third, Integrity argues that Plaintiffs' individual claims under state labor law are invalid because the statutes lack a private right of action. Finally, Integrity contends that Plaintiffs failed to state a claim in their first, second, and sixth causes of action under Nevada labor laws. The Court will address the propriety of each argument individually.

1. Consent to Dismissal of the First Amended Complaint

A party may amend a pleading once "as a matter of course" within 21 days after serving it. Fed. R. Civ. P 15(a)(l)(A). However, if the pleading is one to which a responsive pleading is required or a motion

brought under Rule 12(b), (e), or (f), then within 21 days after service of the responsive pleading or Rule 12 motion, whichever occurs earlier. Fed. R. Civ. P 15(a)(l)(B). After the time for amendment as a matter of course has expired, a party may amend its complaint only by leave of the court or by the adverse party's written consent. Fed. R. Civ. P 15(a)(2). The court has discretion to grant leave and should freely do so "when justice so requires." *Id.; see also Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990).

Integrity argues that the amended complaint should be dismissed because the Court dismissed the original complaint and Integrity presumed the dismissal to be with prejudice. However, the Court's Order (#6) dismissing the original complaint was issued after Plaintiffs filed the amended complaint and did not indicate that the dismissal was with prejudice. The Court, therefore, allowed Plaintiffs' amended complaint to proceed. Furthermore, as Plaintiffs correctly point out, Rule 15(a)(l)(B) gives a party 21 days after an opposing party files a Rule 12(b) motion to amend a pleading as a matter of course. Thus, Plaintiffs were allowed to amend as a matter of course. Accordingly, this argument for dismissal fails.

2. Class Action Claims Under State Labor Law

The FLSA states, "[n]o employee shall be a party plaintiff to any such action unless he gives consent in writing to become such a party and such consent is filed in the court in which such action is brought." 29 U.S.C. § 216(b). This so-called "opt-in" mechanism is

used for FLSA collective actions and requires class members to affirmatively consent to be included in the litigation. Conversely, Rule 23 of the Federal Rules of Civil Procedure governing traditional class action suits states, "the court will exclude from the class any member who requests exclusion." Fed. R. Civ. P 23(c)(2)(B)(v). This "opt-out" provision requires class members to affirmatively 26 opt-out of the class or be bound by the resulting litigation. As a result, the FLSA and Rule 23 appear to have conflicting mechanisms for class membership. *Fetrow-Fix v. Harrah's Entm't, Inc.*, No. 2:10-cv-00560-RLH-PAL, 2010 WL 4774255 (D. Nev. Nov. 16, 2010), *reconsideration denied*, 2011 WL 2313650, June 9, 2011. This Court and others have held that state law class claims which are predicated on the same acts and circumstances as a simultaneously asserted FLSA claim collective action must be dismissed due to the conflicting "opting" mechanisms.[1]

Here, Plaintiffs have asserted state class claims and FLSA class claims arising out of the same acts and circumstances. Integrity argues that Plaintiffs' state class claims are preempted by the FLSA because of the conflicting mechanisms. In opposition,

---

[1] *Williams v. Trendwest Resorts, Inc.*, No. 2:05-cv-0605-RCJ-LRL, 2007 U.S. Dist LEXIS 62396, at *10-12 (D. Nev. Aug. 20,2007) ("the class action mechanisms of the FLSA and Rule 23 are incompatible."); *Leuthold v. Destination America, Inc.*, 224 F.R.D. 462,469-70 (N.D. Cal. 2004) (finding that Congress' intent to have FLSA plaintiffs opt-in would be thwarted if plaintiffs could include unnamed parties through state statutes with only opt-out requirements); *Otto v. Pocono Health System*, 457 F. Supp. 2d 522 (M.D. Pa. 2006).

Plaintiffs rely on a decision by the Honorable Gloria M. Navarro to grant a motion for reconsideration in *Daprizio v. Harrah's Las Vegas, Inc.*, No. 2:10-cv-00604-GMN-RJJ, 2010 U.S. Dist. LEXIS 135113 (D. Nev. Dec. 7, 2010), where Judge Navarro allowed the *Daprizio* plaintiffs to proceed with conflicting class mechanisms. Plaintiffs ask the Court to follow Judge Navarro's lead and find their two class mechanisms compatible. Although Plaintiffs may have some similar circumstances to the plaintiffs in *Daprizio,* that decision is not binding on this Court. Furthermore, the Court finds Plaintiffs' analogous arguments for proceeding with conflicting class mechanisms unpersuasive. Accordingly, the Court dismisses the state class claims.

3. Plaintiffs' FLSA claims and the Portal-to-Portal Act

The FLSA guarantees covered employees a minimum hourly wage for their work and entitles them to one and one-half times their regular wage for overtime. 29 U.S.C. §§ 206, 207. A recurrent question under the FLSA has been when the compensable workday begins and ends. The question often arises where employees perform some tasks before productive work begins or after it ends." *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 217-18 (4th Cir. 2009) (discussing the FLSA's history and the legislation that limited expansive interpretation).

Congress passed the Portal-to-Portal Act (the "Act"), 29 U.S.C. §§ 251-62, in 1947 amending the FLSA. *Id.* The Act provides that employers shall not be subject to liability or punishment under the FLSA for failing to pay an employee minimum wages or

overtime compensation for preliminary or postliminary activities such as walking, riding, or traveling to and from the place of performance of the principle activities. 29 U.S.C. § 254(a). Principal activities are defined as those "which the employee is employed to perform." 29 C.F.R. § 790.8(a). The phrase 'preliminary activity' means an activity engaged in by an employee before he commences his 'principal' activity or activities, and the words 'postliminary activity' means an activity engaged in by an employee after he completes his 'principal' activity or activities." 29 C.F.R. § 790.7(b). "Under this provision, activities like changing clothes and washing which are performed before or after the regular work shift are 'ordinarily' considered preliminary or postliminary activities and are therefore 'excluded from compensable work time' by default." *Sepulveda*, 591 F.3d at 213 (citing *Steiner v. Mitchell*, 350 U.S. 247, 249 (1956)).

As a result, to state a valid claim against an employer for a FLSA violation, a plaintiff must allege that he was not compensated for activities that were "an integral and indispensable part of the principal activities for which [he is] employed." *Rutti v. Lojack Corp. Inc.*, 596 F.3d 1046, 1055 (9th Cir. 2010) (citing *Lindow v. United States*, 738 F.2d 1057, 1060 (9th Cir. 1984)). Courts must give "principal activities" a liberal construction no matter when the work is performed and must also consider "the extent to which the work impacts the employee's freedom to engage in other activities." *Id.* (citation omitted); *see also* 29 C.F.R. § 790.8(a). To determine that an activity is "integral and indispensable," and therefore compensable, a court must conclude that the activity

is performed as part of the employee's regular work in the ordinary course of business—not that the activity in question is uniquely related to the predominant business activity. *Id.* at 1056.

a. Security Screening

Waiting time generally does not qualify as integral and indispensable. *See* 29 C.F.R. § 790.7(g) (stating that "when performed under the conditions normally present," "checking in and out and waiting in line to do so" are considered non-compensable preliminary or postliminary activities). As the Supreme Court has distinguished, "the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are integral and indispensable to a principal activity." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 40 (2005) (internal citation omitted).

Integrity contends that the time Plaintiffs' allegedly spent waiting in line for postwork security screenings is not actionable under the FLSA because this activity is not integral and indispensable to their principal activities of employment. Plaintiffs allege that this was a principle activity because this exercise was a daily requirement and took a significant amount of time—approximately 25 minutes. They further allege that the screening is mandatory for all employees. These allegations, however, do not demonstrate that the security process is integral and indispensable to their principal activities as warehouse employees fulfilling online purchase orders. Instead, these allegations fall squarely into a non-compensable category of

postliminary activities such as checking in and out and waiting in line to do so and "waiting in line to receive pay checks," 29 C.F.R. § 790.7(g), because Plaintiffs could perform their warehouse jobs without such daily security screenings. Plaintiffs therefore fail to state a valid claim that the security screens were a part of their regular work. The weight of authority concerning preliminary and postliminary security screenings supports this conclusion.[2] These cases pose difficult hurdles for a plaintiff to overcome because the necessity of the security screenings in those cases was great, yet it was still not integral and indispensable to the principal activities of employment. Accordingly, the Court dismisses Plaintiffs' claims with respect to security screening.

b. Meal Period

Under FSLA regulations, an "employee must be completely relieved from duty for the purpose of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period." 29 C.F.R.

---

[2] *See, e.g., Gorman v. The Consolidated Edison Corp.*, 488 F.3d 586, 592-93 (2d. Cir. 2007) (holding that while security procedures including "waiting in line and passing through a radiation detector, x-ray machine, and explosive metal detector" were necessary because they served an "essential purpose of security," they were not "integral" to the nuclear power station's employees principal activities); *Bonilla v. Baker Concrete Construction, Inc.*, 487 F.3d 1340, 1345 (11th Cir. 2007) (concluding that time spent going through airport security to report to work was not compensable under the FLSA); *DeAsencio v. Tyson Foods, Inc.*, 500 F.3d 361, 364 n. 5 (3d Cir. 2007); *Sleiman v. DHL Express*, 2009 WL1152187, at *4 (E.D. Pa. 2009) (collecting cases and concluding that a security screening was "not compensable under the FLSA").

§ 785.19(a). "Bona fide meal periods are not work time," *Id.;* and are therefore excluded from compensable work time under the FLSA. *See* 29 C.F.R. § 785.18. However, if an employee is required to perform any duties while eating, he is not "completely relieved from duty" and the time should be considered "hours worked" for purposes of calculating overtime. *Id.; see also Marshall v. Valhalla Inn,* 590 F.2d 306, 308 (9th Cir. 1979).

The parties disagree with respect to which test the Ninth Circuit employs to determine whether a meal period is "bona fide." Integrity urges the Court to follow the "predominant benefit test," which examines whether the meal time is spent primarily for the employer's or employee's benefit. *See, e.g., Nelson v. Waste Mgmt. of Alameda County, Inc.,* No. C 99-0120 SI, 2000 WL 868523, at * 3 (N.D. Cal. June 19, 2000). Plaintiffs, however, assert that the proper test is the "completely relieved from duty" standard, *Brennan v. Elmer's Disposal Service, Inc.,* 510 F.2d 84, 88 (9th Cir. 1975), under which an employee cannot be subject to "significant affirmative responsibilities" during his meal period. *Kohlheim v. Glynn County, Ga.,* 915 F.2d 1473, 1477 (11th Cir. 1990).[3] In *Brennan,* the Ninth Circuit held that "[a]n

---

[3] The Ninth Circuit has not directly addressed either test since deciding *Brennan* except for a brief reference *in Alvarez v. IBP, Inc,* 339 F.3d 894, *aff'd,* 543 U.S. 1144 (2005), wherein the court compared the two FLSA-based standards with Washington's administrative code governing 30-minute meal breaks. *Id.* at 913; *see also Chao v. Tyson Foods, Inc.,* 568 F Supp. 2d 1300, 1306-07 n.4 (N.D. Ala. 2008) (examining the circuit split between the two tests and concluding that the

employee cannot be docked for lunch breaks during which he is required to continue with any duties related to his work." *Brennan*, 510 F.2d at 88. In other words, the "essential consideration" is whether an employee is "in fact relieved from work for the purpose of eating a regularly scheduled meal." *Kohlheim*, 915 F.2d at 1477.

The Court finds that Plaintiffs have failed to state a valid claim under either standard. Integrity argues that Plaintiffs' allegation that it did not provide a bona fide, 30-minute meal period are insufficient under the Act because they were not expected—nor was it possible—to perform any duty during that time. Plaintiffs allege they were not free from the employer's control because they were required to walk long distances to clock in and out during their 30-minute meal period. They further allege that they were not relieved from their duties because the time spent walking to the remote cafeteria meant they only received a 20-minute uninterrupted meal period. In the Court's view, these allegations are inadequate because 29 C.F.R. § 785.19 does not require an uninterrupted meal period to be free of an employer's control, only free of employment duties. Plaintiffs have not alleged that they performed any duty related to their job as warehouse workers either during the walk or once they arrived at the cafeteria. Thus, Plaintiffs did not allege they performed a significant affirmative responsibility while on their meal breaks. The Court

---

Ninth and Eleventh Circuits still employ the "completely relieved from duty" standard).

therefore finds that Plaintiffs' allegations fail to state a valid claim with respect to meal periods.

c. The *De Minimis* Rule

In the alternative, the Court finds that Plaintiffs' allegations related to shortened meal periods would easily fall under the *"de minimis* rule," which moderates an employer's obligation to pay for an employee's efforts. *Rutti,* 596 F.3d at 1056. In determining whether otherwise compensable time is *de minimis, a* court will consider: "(1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work." *Id.* at 1057. This test reflects "a balance between requiring an employer to pay for activities it requires of its employees and the need to avoid 'split-second absurdities' that 'are not justified by the actuality of the working conditions'." *Id.* (quoting *Lindow,* 738 F.2d at 1062). Although it has not adopted a categorical ten or fifteen minute bright-line approach to the *de minimis* rule, the Ninth Circuit has noted that "most courts have found daily periods of approximately 10 minutes *de minimis* even though otherwise compensable." *Id.* at 1058 (citation excluded).

Plaintiffs claim that they "were required to spend up to 10 minutes per day during their meal period walking to and from the cafeteria and/or undergoing security clearances." (Dkt. #11, Am. Compl. ¶ 11.) In addition, Plaintiffs spent "a significant amount of time walking from one end of the facility to another" throughout the work day. (*Id.* 113.) As the Court previously explained, the Act

excludes activities such as walking to and from the place of performance of the principle activities from compensable wages under the FLSA. 29 U.S.C. § 254(a). Thus, on its face, the two five-minute walks were not compensable.

Nevertheless, taking Plaintiffs allegations as true, the Court concludes that the two five-minute walks per day were *de minimis* because recording such time would pose a practical administrative difficulty to record each warehouse employee's time spent walking. This is particularly true because employees spent their work days traversing the entire warehouse. Thus, Plaintiffs may have spent little or no time walking to and from the time-keeping system on certain days if they happened to be next to the system when their meal period began. Further bolstering this conclusion, Plaintiffs do not allege they walked 10 minutes during *each* day's meal period; therefore, regularity in this activity cannot be concluded. Although the Court cannot say that 10 minutes per day is a split-second absurdity, Ninth Circuit precedent and the actualities of working conditions in this case compel a finding that this time is *de minimis* and non-compensable.

5. Private Right of Action to Recoup Unpaid Wages

NRS §§ 608.018 and 608.019 state that an employee must be compensated for overtime worked and be provided meal and rest periods. Although there is no private right of action expressly stated in these two statutes, NRS § 608.140 provides a private right of action to recoup unpaid wage violations when stating that other fees may be added in addition to

the amount due for unpaid wages. Furthermore, the Nevada Supreme Court has recognized that NRS § 608.140 contains an express civil remedy in the form of a civil action by employees to recoup unpaid wages. *Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96, 104 (Nev. 2008).

Integrity argues that there is no private right of action under NRS §§ 608.018 and 608.019 for Plaintiffs to recoup unpaid wages. In essence, Integrity argues that overtime pay is not wages but it is special compensation for work in excess of 40 hours per week. Integrity urges the Court to follow an unpublished decision in this District, *Lucas v. Bell Trans*, No. 2:08-cv-01792-RCJ-RJJ, 2009 WL 2424557 (D. Nev. June 24, 2009), which seemingly supports Integrity's argument by stating that a private right of action for unpaid wages "does not extend to minimum wages or overtime compensation." *Id.* at *5. However, Integrity fails to recognize that IQ the circumstances in *Lucas* were quite different than the case at bar because its plaintiffs were limousine drivers who were subject to a statutory exclusion from overtime pay. *Id.* at *8. The *Lucas* court did not conclude that unpaid overtime pay is not unpaid wages for which NRS § 608.140 provides a private right of action. *Buenaventura v. Champion Drywall, Inc.*, 2011 WL 1071760, at *3-4 (D. Nev. Mar. 21, 2011) (discussing *Lucas* and concluding that a plaintiff may pursue a claim to enforce NRS § 608.018 for unpaid overtime either directly or via NRS § 608.140). Therefore, Integrity's argument fails.

The Court finds that Plaintiffs correctly use NRS § 608.140 as the private right of action to recoup unpaid wages period under NRS §§ 608.018 and 608.019. Nevertheless, Plaintiffs have failed to allege fact scenarios that would support a valid claim under these Nevada statutes. Their entire amended complaint relates to the security clearance and shortened meal periods. Since the predicate to Plaintiffs' claims for violation of NRS §§ 608.018 and 608.019 has failed, these claims are legal conclusions that do not permit the court to infer more than the mere possibility of misconduct. *See Iqbal,* 129 S. Ct. at 1949. Accordingly, Plaintiffs have failed to state sufficient facts to proceed with their claims under NRS §§ 608.018 and 608.019.

6. NRS § 608.030

NRS §§ 608.020 and 608.030 address the timing for payment of unpaid wages to former employees. Plaintiffs allege that Integrity failed to pay them and members of the proposed class their unpaid wages within the time set forth in these statutes. Conversely, Integrity asserts that Plaintiffs do not set forth a claim under Nevada state law because their FLSA claims for security clearance and shortened meal periods fail as a matter of law. Although Integrity's conclusion would not be true in every instance, here, Plaintiffs have failed to allege fact scenarios other than the security clearance and shortened meal periods that would support a valid claim under NRS § 608.030. Thus, as previously explained, the remainder of Plaintiffs' state law labor claims are legal conclusions that do not permit the Court find that their allegations rise above the

speculative level. *See Twombly,* 550 U.S. at 555. Accordingly, Plaintiffs have failed to state a claim under NRS § 608.030 and the Court grants Integrity's motion.

CONCLUSION

Accordingly, and for good cause appearing, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (#16) is GRANTED in its entirety. The Clerk of the Court is directed to close this case.

Dated: July 19, 2011.

ROGER L. HUNT
United States District Judge

Appendix D

Relevant Statute & Regulation

29 U.S.C. § 254

Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation

(a) Activities not compensable

Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are

incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

(b) Compensability by contract or custom

Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to any activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) Restriction on activities compensable under contract or custom

For the purposes of subsection (b) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice

only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) Determination of time employed with respect to activities

In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

29 C.F.R. § 790.7

"Preliminary" and "postliminary" activities.

(a) Since section 4 of the Portal Act applies only to situations where employees engage in "preliminary" or "postliminary" activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked. If such time would otherwise be counted as time worked under the Fair Labor Standards Act, section 4 may not change the situation. Whether such time must be counted or may be disregarded, and whether the relief from liability or punishment afforded by section 4 of the Portal Act is available to the employer in such a situation will depend on the compensability of the activity under contract, custom, or practice within the meaning of that section.[40] On the other hand, the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not "preliminary" or "postliminary" activities outside the workday.[41] And even where there is a

---

[40] See Conference Report, pp. 10, 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2178-2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298. See also §§ 790.4 and 790.5.

[41] See Conference Report, p. 12; Senate Report, pp. 47, 48; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Representative Gwynne, explaining the conference agreement

contract, custom, or practice to pay for time spent in such a "preliminary" or "postliminary" activity, section 4(d) of the Portal Act does not make such time hours worked under the Fair Labor Standards Act, if it would not be so counted under the latter Act alone.[42]

(b) The words "preliminary activity" mean an activity engaged in by an employee before the commencement of his "principal" activity or activities, and the words "postliminary activity" means an activity engaged in by an employee after the completion of his "principal" activity or activities. No categorical list of "preliminary" and "postliminary" activities except those named in the Act can be made, since activities which under one set of circumstances may be "preliminary" or "postliminary" activities, may under other conditions be "principal" activities. The following "preliminary" or "postliminary" activities are expressly mentioned in the Act: "Walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which (the) employee is employed to perform."[43]

(c) The statutory language and the legislative history indicate that the "walking, riding or traveling" to which section 4(a) refers is that which occurs, whether on or off the employer's premises, in

---

to the House of Representatives, 93 Cong. Rec. 4388. See also § 790.6.

[42] See § 790.5(a).

[43] Portal Act, subsections 4(a), 4(d). See also Conference Report, p. 13; statement of Senator Donnell, 93 Cong. Rec. 2181, 2362.

the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee's regular working hours.[44] For example, travel by a repairman from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of "walking, riding or traveling" described in section 4(a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel would not ordinarily be "walking, riding, or traveling" of the type referred to in section 4(a). One example would be a traveling employee whose duties require him to travel from town to town outside his regular working hours; another would be an employee who has gone home after completing his day's work but is subsequently called out at night to travel a substantial distance and perform an emergency job

---

[44] These conclusions are supported by the limitation, "to and from the actual place of performance of the principal activity or activities which (the) employee is employed to perform," which follows the term "walking, riding or traveling" in section 4(a), and by the additional limitation applicable to all "preliminary" and "postliminary" activities to the effect that the Act may affect them only if they occur "prior to" or "subsequent to" the workday. See, in this connection the statements of Senator Donnell, 93 Conf. Rec. 2121, 2181, 2182, 2363; statement of Senator Cooper, 93 Cong. Rec. 2297. See also Senate Report, pp. 47, 48.

for one of his employer's customers.[45] In situations such as these, where an employee's travel is not of the kind to which section 4(a) of the Portal Act refers, the question whether the travel time is to be counted as worktime under the Fair Labor Standards Act will continue to be determined by principles established under this Act, without reference to the Portal Act.[46]

(d) An employee who walks, rides or other wide travels while performing active duties is not engaged in the activities described in section 4(a). An illustration of such travel would be the carrying by a logger of a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to the cutting area. In such a situation, the walking, riding, or traveling is not segreable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) and it does not constitute travel "to and from the actual place of performance" of the principal activities he is employed to perform.[47]

---

[45] The report of the Senate Judiciary Committee (p. 48) emphasized that this section of the Act "does not attempt to cover by specific language that many thousands of situations that do not readily fall within the pattern of the ordinary workday."

[46] These principles are discussed in part 785 of this chapter.

[47] Senator Cooper, after explaining that the "principal" activities referred to include activities which are an integral part of a "principal" activity (Senate Report, pp. 47, 48), that is, those which "are indispensable to the performance of the productive work," summarized this provision as it appeared in the Senate Bill by stating: "We have clearly eliminated from compensation walking, traveling, riding, and other activities

(e) The report of the Senate Committee on the Judiciary (p. 47) describes the travel affected by the statute as "Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out." The phrase, actual place of performance," as used in section 4(a), thus emphasizes that the ordinary travel at the beginning and end of the workday to which this section relates includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the performance of the principal activity or activities, and the return travel from that place at the end of the workday. However where an employee performs his principal activity at various places (common examples would be a telephone lineman, a "trouble-shooter" in a manufacturing plant, a meter reader, or an exterminator) the travel between those places is not travel of the nature described in this section, and the Portal Act has not significance in determining whether the travel time should be counted as time worked.

(f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1) walking or riding by an employee between the plant gate and the

---

which are not an integral part of the employment for which the worker is employer." 93 Cong. Rec. 2299.

employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.[48]

(g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.[49]

(h) As indicated above, an activity which is a "preliminary" or "postliminary" activity under one set of circumstances may be a principal activity under other conditions.[50] This may be illustrated by the following example: Waiting before the time established for the commencement of work would be

---

[48] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2121, 2182, 3263.

[49] See Senate Report p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity" See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298. See also paragraph (h) of this section and §790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

[50] See paragraph (b) of this section. See also footnote 49.

regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities.[51] The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged.[52]

---

[51] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2298.

[52] See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 7 WHR 1165.

OPPOSITION BRIEF

No. 13-433

IN THE

Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC.,

Petitioner,

v.

JESSE BUSK AND LAURIE CASTRO,
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. Box 353020
Seattle, Washington 98195
(206) 616-3167

MARK R. THIERMAN
Counsel of Record
JOSHUA D. BUCK
THIERMAN LAW FIRM, P.C.
7287 Lakeside Drive
Reno, Nevada 89511
(775) 284-1500
mark@thiermanlaw.com

Counsel for Respondents

251413

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The Fair Labor Standards Act requires that covered employees who work more than forty hours in a week be compensated for those additional hours at a rate of at least one and one-half times their normal rate. Under the Portal-to-Portal Act an employee's work includes his or her "principal activities." This Court's decisions establish that compensable work also includes any activity which is "integral and indispensable" to the employee's principal activities. The question presented is:

Did the Ninth Circuit err in holding under the circumstances of this case that a worker's participation in an anti-theft search and screening was integral and indispensable to his principal activities?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS... ii

TABLE OF CITED AUTHORITIES iii

INTRODUCTION. 1

STATEMENT.. 3

REASONS FOR DENYING THE PETITION .. .6

I. THERE IS NO CIRCUIT CONFLICT REGARDING THE COMPENSABILITY OF THE PARTICULAR ACTIVITIES AT ISSUE IN THIS CASE 6

II. THE NINTH CIRCUIT'S APPLICATION OF ESTABLISHED LEGAL PRINCIPLES TO THE PARTICULAR CIRCUMSTANCES OF THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT 18

III. THIS CASE PRESENTS NO IMPORTANT ISSUE WARRANTING REVIEW BY THIS COURT .. .. .23

CONCLUSION .. .. .29

TABLE OF CITED AUTHORITIES

Page

Cases

Alvarado v. Costco Wholesale Corp.,
2008 WL 2477393 (N.D. Cal. June 18, 2008) .25

Alvarez v. IBP, Inc.,
339 F.3d 894 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005) .. .. .10

Bonilla v. Baker Concrete Construction, Inc.,
487 F.3d 1340 (11th Cir. 2007). 8, 9, 11

Bonilla v. Baker Concrete, Inc.,
No. 06-12515-A (11th Cir), 2006 WL 2365270. . .8

Ceja-Corona v. CVS,
2013 WL 796649. . . .. .. .28

Cervantez v. Celestica Corp.,
618 F. Supp. 2d 1208 (C.D. Cal. 2009) .. .. .27

Frelkin v. Apple, Inc.,
No. 13-cv-3451-WHA (N.D.Cal.). . . . .. .28

Gorman v. Consolidated Edison Corp.,
488 F.3d 586 (2d Cir. 2007) .. .. *passim*

Gorman v. Consolidated Edison Corp.,
No. 2005-6546 (2d Cir.), 2006 WL 6263996 . . . .12, 14

Cited Authorities

Page

IBP, Inc. v. Alvarez,
546 U.S. 21 (2005). 1, 2

Morillion v. Royal Packing Co.,
22 Cal. 4th 575 (2000). 26

Steiner v. Mitchell,
350 U.S. 247 (1956) . . . . . *passim*

Whalen v. United States,
93 Fed. Cl. 579 (2010). 9, 14

Statutes and Other Authorities

29 U.S.C. § 207(a). 1

29 U.S.C. § 254(a)(2) 1

29 C.F.R. § 790.6 2

29 C.F.R. § 790.8(c) 21

N.R.S. 608.018(1) 5

INTRODUCTION

The Fair Labor Standards Act ("FLSA") provides that a covered employee who "is employed for a workweek longer than forty hours" must be paid for any hours in excess of forty at a rate at least one and one-half times his or her regular rate. 29 U.S.C. § 207(a). The FLSA itself does not contain a definition of "workweek" or "work." The scope of this overtime rate requirement is governed in part by the Portal-to-Portal Act, which provides that an employer is not required to treat as compensable work "activities which are preliminary to or postliminary to [the] principal activity or activities [which such employee is employed to perform], which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a)(2).[1] Under the Portal-to-Portal Act, time an employee devotes to any "principal activity or activities" is compensable and must be considered in determining whether he or she worked more than forty hours in a week.

In addition, "activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities

---

1. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 28 (2005)("Other than its express exceptions for travel to and from the location of the employee's 'principal activity,' and for activities that are preliminary or postliminary to that principal activity, the Portal-to-Portal Act does not purport to change this Court's earlier descriptions of the terms 'work,' and 'workweek,' or to define the term 'workday.'")

for which covered workmen are employed." *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). This Court reiterated that "integral and indispensable" standard in *IBP, Inc. v. Alvarez*, 546 U.S. 21, 29, 30, 34 n. 6 (2005). See Pet. 2-3 (recognizing "integral and indispensable" standard). "[A]ny activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity.'" 546 U.S. at 37.

This case concerns the application of that well-established "integral and indispensable" standard. The plaintiffs are required at the end of each workday to participate in an anti-theft search and screening process. The court of appeals held that the time the workers devoted to that search and process was integral and indispensable to their principal activities. (Pet.App. 10-13). If that is correct, the employees would also be entitled to compensation for the time they spend waiting to participate in the anti-theft screening; under the continuous workday rule, an employer must compensate a worker for waiting time that occurs after the first compensable activity but prior to the last such activity.[2] The continuous workday rule is not in dispute; the litigation concerns the compensability of the anti-theft screening process itself.

The petition raises two distinct questions. First, it asserts that there is a circuit split as to whether a

---

2. *IBP*, 546 U.S. at 37 ("[D]uring a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of [section 4(a) of the Portal-to-Portal Act], and as a result is covered by the FLSA"); see 29 C.F.R. § 790.6.

"security screening" can *ever* be compensable under the FLSA, as modified by the Portal-to-Portal Act. Petitioner contends that the Second and Eleventh Circuits have held that a "security screening" is never compensable, and that the Ninth Circuit decision below thus departed from that asserted rule when it held that, in the particular circumstances of this case, the time the plaintiffs were required to spend in the anti-theft screening was indeed compensable. As we explain below, neither the Second nor the Eleventh Circuit has adopted such a rule; rather, those circuits rejected the claims at issue because they involved practices materially different from the circumstances in the instant case. Second, the petition urges that the Ninth Circuit erred in holding that in the particular circumstances of this case participation in the anti-theft screening process was integral and indispensable to the principal activities of the plaintiff workers. But petitioner's claim of error in the fact-bound application of that standard to the particular claim in this case does not present any circuit conflict or otherwise warrant review by this Court.

STATEMENT

Petitioner Integrity Staffing Solutions, Inc., provides staffing to Amazon.com warehouses throughout the nation. Respondents Busk and Castro worked for Integrity as hourly employees in Nevada warehouses, filling orders placed by Amazon.com customers. At the end of each day, after they had clocked out, respondents were not permitted to leave the warehouse until they had been subjected to an anti-theft "security clearance." During the clearance process respondents and other employees emptied their pockets, removed their wallets, keys and

belts, and passed through metal detectors. The clearance process itself may have been relatively brief. (See Pet. 3 ("short security screening")). But because Integrity hired too few screeners for the many hundreds of employees who simultaneously leave at the end of each shift, employees such as respondents waited for approximately 25 minutes—after they had clocked out and when they were no longer being paid—before they were searched and finally permitted to leave the warehouse. (Pet.App. 4, 20).[3]

Respondents commenced this action in federal district court asserting two distinct claims. First, they contended that Integrity violated the FLSA because it did not pay them overtime for the time spent during (and awaiting) the security clearance process. The complaint asked the court to permit the FLSA claim to be heard as a collective action on behalf of all similarly situated Integrity employees nationwide.[4] Second, respondents contended that Integrity's actions in this regard also violated the Nevada statute requiring that workers be paid time and one-half for overtime and that they be paid for all hours

---

3. First Amended Collective and Class Action Complaint, ¶ 16 ("At the end of their respective shifts, hundreds of warehouse employees would walk to the timekeeping system to clock out and were then required to wait in line in order to be searched for possible warehouse items taken without permission and/or other contraband. . . . Plaintiffs . . . were required to wait approximately 25 minutes each day at the end of shift without any compensation in order to undergo a search for possible contraband or pilferage of inventory . . . .").

4. First Amended Collective and Class Action Complaint, ¶ 21. Opt-out class actions are not permitted under the FLSA, which requires individuals who wish to take part in the proceedings to opt in individually. (See Pet.App. 5-6).

worked.[5] N.R.S. 608.018(1). (The parties disagree about whether the Nevada law provides protections greater than the FLSA, and the court of appeals did not resolve that issue). The complaint asked with regard to this state law claim that the court certify a class action on behalf of all similarly situated persons within the state of Nevada.

The district court granted Integrity's motion to dismiss. It reasoned that the security clearance was not integral and indispensable to the plaintiff's warehouse jobs because the workers "could perform their warehouse jobs without such daily security screenings." (Pet.App. 28). The district court also dismissed plaintiffs' Nevada state law claims. (Pet.App. 34).

The court of appeals reversed. The Ninth Circuit based its decision on this Court's precedent that activities are compensable "if they are 'integral and indispensable' to an employee's principal activities." (Pet.App. 10)(quoting *Steiner v. Mitchell*, 350 U.S. 247, 332 (1956)). It reasoned that plaintiffs "allege that the screenings are intended to prevent employee theft—a plausible allegation since the employees apparently pass through the clearances only on their way out of work, not when they enter. As alleged, the security clearances are necessary to employees' primary work as warehouse employees and done for Integrity's benefit. Integrity allegedly requires the screening to prevent employee theft, a concern that stems from the nature of the employees' work (specifically, their access to merchandise)." (Pet.App. 11-12). The Ninth Circuit held that the district court had erred in assuming that decisions

5. First Amended Collective and Class Action Complaint, ¶ 50.

in the Second and Eleventh Circuit had "created a blanket rule that security clearances are noncompensable instead of assessing the plaintiffs' claims under the 'integral and indispensable' test." (Pet.App. 13.) The Ninth Circuit also reversed the dismissal of plaintiffs' Nevada state law claims. (*Id.*).

REASONS FOR DENYING THE PETITION

I. THERE IS NO CIRCUIT CONFLICT REGARDING THE COMPENSABILITY OF THE PARTICULAR ACTIVITIES AT ISSUE IN THIS CASE

(1) The central premise—and flaw—of the petition is its assumption that any activity that constitutes a "security screening" must always be treated the same way under the FLSA—*i.e.*, that a "security screening" either is, or is not, compensable under the FLSA. "The question presented is whether time spent in security screenings is compensable under the FLSA, as amended by the Portal-to-Portal Act." (Pet. i). Petitioner asks the Court "to resolve a highly consequential two-to-one circuit split over whether time spent in security screenings is compensable under the FLSA, as amended by the Portal-to-Portal Act." (Pet. 12). Petitioner evidently intends the phrase "security screening" to refer to any steps to confirm the identity of an employee or to conduct some sort of search of the employee's person or belongings. Although the phrase "security screening" does not appear in the FLSA or the Portal-to-Portal Act, petitioner insists that those laws create a per se rule under which a "security screening" is never compensable.

But there is a wide divergence in the types of employee (and visitor) searches and identification procedures that

exist at plants and offices, and there is no reason to assume that the compensability of those searches and procedures will always be the same regardless of the particular circumstances involved. Such searches and/or procedures may apply to employees and non-employees alike, to all employees, or to only certain employees. They may occur at the beginning, middle, or end of the work day, and may be conducted at differing types of locations within a facility. Searches are undertaken to seek different types of things, such as weapons, explosives, pilfered merchandise or tools, cameras, recording devices, or documents; some searches are initiated to ascertain whether an employee has been contaminated by a substance of which the worker himself may be unaware.[6] The purpose and effect of such searches and procedures will in some instances be directly related to the employee's particular job, but in other situations will have no such connection.

Consistent with its insistence that all "security screenings" must have the same status under the FLSA and the Portal-to-Portal Act, petitioner asserts that "[a]s the law currently stands, security screening time is compensable under the FLSA in the Ninth Circuit, but not in the Second and Eleventh Circuits." (Pet. 22). But the Ninth Circuit manifestly did not hold that a "security screening" is always compensable; to the contrary, the court of appeals below limited its holding of compensability to the particular activities alleged in this case, and did not question the correctness of decisions holding that screenings were not compensable in certain other circumstances. (Pet.App. 12). Conversely, neither the Second nor the Eleventh Circuit has adopted a per se rule that "security screenings" are never compensable.

---

6. See Pet. 23 ("screenings take a variety of forms").

(2) Petitioner contends that in *Bonilla v. Baker Concrete Construction, Inc.*, 487 F.3d 1340 (11th Cir. 2007), the Eleventh Circuit adopted a rule "that time spent in security screenings is not subject to the FLSA because it is *not* 'integral and indispensable' to employees' principal job activities." (Pet. i)(emphasis in original); see *id.* 4 ("decision[] from the Eleventh Circuit[] hold[s] that employees are *not* entitled to compensation for time spent in security screenings")(emphasis in original)). That is not correct.

The employees in *Bonilla* were construction workers building a new terminal at the Miami International Airport. "In order to reach their work sites inside the airport, [the workers] were required to pass through a single security checkpoint to the tarmac and then ride authorized buses or vans to their particular work site." 487 F.3d at 1341. As every air traveler knows, access to the part of any airport where airplanes are located is strictly limited and monitored; a member of the public must go through a careful screening process before entering most of an airport. "Airports are by nature heavily secured, even more so following the events of September 11, 2011, and one has to expect an airport like Miami International Airport to be protected by tight security measures. These conditions apply equally to visitors, travelers and employees alike and are not simply a function of employment." Appellee's Answer Brief, *Bonilla v. Baker Concrete, Inc.*, No. 06-12515-A (11th Cir.), 2006 WL 2365270 at *20-*21.

The Eleventh Circuit in *Bonilla* explained that it applied a three-part standard in determining whether a particular activity is "so 'integral and indispensable' as to be compensable [under the FLSA]." *Id.* 1344.

Under controlling circuit precedents, one "factor[ ] to be considered" was "whether the activity primarily benefits the employer." *Id.* It was that specific factor which the Eleventh Circuit concluded was absent in *Bonilla*. "[A]lthough the screening was necessary for the employees to perform their work, [the employer] did not primarily—or even particularly—benefit from the security regime." *Id.*

> The statutory language of the exemptions does not allow for a clean analytical distinction between those activities that are 'integral and indispensable' and those that are not. But it is clear to us from the Act's language and history that the activity in question must work in the benefit of the employer, and that the security screening mandated by the FAA in this case is not compensable work. We therefore hold that the time appellants spend going through the mandatory security screening is not compensable under the FLSA because that screening is not 'integral and indispensable' to the principal activity

Id. at 1345.[7] The Eleventh Circuit's decision did not establish a general rule that any activity that might be described as a "security screening," cannot be compensable, but was expressly limited to "the security screening . in this case." The decision rested on a very specific rationale, the fact that the screening in *Bonilla*—although (like all airport screenings) protecting airplanes

---

7. *Whalen v. United States*, 93 Fed.Cl. 579, 600 n. 22 (2010), recognized that the absence of any benefit to the employer was the basis for the decision in *Bonilla*.

and passengers by excluding unauthorized personnel and possible weapons or explosives—was of no benefit to a builder whose construction project happened to be located within the airport's security perimeter.

Petitioner asserts that "[s]ecurity screenings of construction workers or warehouse workers plainly do not meet the one relevant test, as the Eleventh Circuit . correctly held." (Pet. 22). But the "relevant test" which the Eleventh Circuit held to be unmet in *Bonilla* was the required showing that a disputed activity benefits the employer. The Eleventh Circuit assuredly did not hold that no imaginable screening could ever benefit the employer of any construction or warehouse worker. The complaint in this case alleges that the function of the screening process here is to prevent pilferage of materials in the warehouse; if that is correct—as must be assumed on a motion to dismiss—it surely would benefit the employer. Integrity does not dispute that it benefits from the prevention of such thefts. The Ninth Circuit noted that under its precedents, like those in the Eleventh Circuit, one factor considered in deciding whether an activity is "integral and indispensable" is whether it was "done for the benefit of the employer." (Pet.App. 11 (quoting *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902-03 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005)). It noted that in this case the complaint "alleged [that] the security clearances are . . . done for Integrity's benefit." (Pet.App. 11-12).[8] One

---

8. Petitioner devotes most of its discussion of *Bonilla* not to discussing the actual reasoning of the Eleventh Circuit, but instead to criticism of the Ninth Circuit's explanation of *Bonilla*.

> The [Eleventh Circuit in *Bonilla*] noted that the security screenings were not for the 'benefit of the employer' because they were 'mandated by the [Federal Aviation Administration],' rather than the

of the amicus briefs filed in support of the petition argues at length that employers have a vital interest in screening that serves that salutary purpose.[9]

(3) Petitioner asserts that the Second Circuit decision in *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007) held that "security screenings" are never compensable. (Pet. 18-20). That is not correct.

> employer. [487 F.3d] at 1345. The Ninth Circuit seized on the latter fact, finding *Bonilla* to be distinguishable because "the Federal Aviation Administration mandated the security process.' Pet.App. 12.

(Pet. 21). Petitioner attacks this supposed Ninth Circuit analysis, insisting that "[t]he Ninth Circuit's attempted distinction of *Bonilla* would . . . lead to bizarre results." *Id.* 22.

But the Ninth Circuit did not distinguish *Bonilla* on the ground that the screening practice in that case had been mandated by the FAA. The Ninth Circuit actually used the verb "distinguish" in a very different explanation, commenting that *Bonilla* (and the Second Circuit case discussed below) were "distinguishable because, in these cases, everyone who entered the workplace had to pass through a security clearance." (Pet.App. 12). The only reference in the Ninth Circuit's opinion to the FAA occurred, not in its explanation of why the holding in *Bonilla* was inapplicable here, but in its summary of the reasoning in *Bonilla*. "Because the Federal Aviation Administration mandated the security process, the court held that the screening did not benefit the employer." (Pet.App. 12).

9. Brief of the Retail Litigation Center, Inc., Chamber of Commerce of the United States of America, et al., as *Amici Curiae* in Support of Petitioner, 12 ("[E]mployee theft in the retail industry—known in industry parlance as 'shrinkage'—causes billions of dollars in losses each year To combat employee theft, many retailers use loss-prevention programs that include visually examining employee bags after the conclusion of employee work shifts.").

The plaintiffs in *Gorman* worked at the Indian Point Nuclear Power Plant north of New York City. Security at a nuclear power plant is exceptionally stringent because of concerns about a possible terrorist attack and because of the potential health hazards if workers were accidentally exposed to nuclear contamination. "Indian Point has several layers of security including highly restrictive access that is controlled by state-of-the-art systems. Indian Point is monitored around the clock by well-trained, heavily armed security officers. The plant and property are protected by multiple vehicle barriers, double fencing with razor wire, television surveillance and other high tech security devices. It is designed to safeguard the plant personnel even under extreme and unlikely assault scenarios."[10] Everyone entering the plant site is subject to extensive screening, involving individual identification, inspection of cars (including, at times, inspection of the engine and undercarriage), and passing through a radiation detector, an explosive material detector, and a metal detector. 488 F.3d at 592. Everyone leaving the plant is subjected to a more sensitive radiation test. *Id.*at 592 n.2.[11]

The Second Circuit concluded that these security measures, although indispensable, did not satisfy the "requirement that they be 'integral' [to the employee's principal activities] as well. *Steiner*, 350 U.S. at 256." 488

---

10. http://www.safesecurevital.com/safe-secure-vital/security.html (visited Jan. 4, 2014).

11. "In order to leave the plant, employees and other visitors to the plant would check out, going through the steps of the checking-in process, except for the search, in reverse." Appellee's Brief, *Gorman v. Consolidated Edison Corp.*, No. 2005-6546 (2d Cir.), 2006 WL 6263996 at Statement, part A.

F.3d at 592. The security activities were not "integral" to the jobs of the Indian Point employees, it held, because the security screening was imposed on everyone entering and leaving the plant, including non-employees, and were the same regardless of the job of any particular employee.

> The activities required to enter and exit Indian Point . are necessary in the sense that they are required and serve essential purposes of security; but they are not integral to principal work activities. [T]he activities while arguably indispensable, are not integral to their principal activities. At Indian Point, this is easily demonstrated because the security measure at entry are required (to one degree or another) for everyone entering the plant—regardless of what an employee does (servicing fuel rods or making canteen sandwiches)—and including visitors. *See Gorman v. Entergy*, No. 04 Civ. 8484 (S.D.N.Y. filed Apr. 17, 2006) (citing plaintiffs' memorandum in opposition to defendant's motion to dismiss).

488 F.3d at 594. The district court decision in *Gorman*, cited by the court of appeals, made the same point.

> Plaintiff has not presented any arguments or facts from which this court could find that Plaintiff has a unique situation where these preshift activities are so directly related to his specific work that they are an integral part of his principal activity. Notably, Plaintiff's complaint does not even mention what kind of work Plaintiff does at IPEC. . . .This conclusion is strengthened by the fact that all people who

> enter the plant, visitors and employees alike, must go through the same process that Plaintiff does.

Memorandum Decision, April 17, 2006, p. 5 (Doc. 55; Case 7:04-cv-08484-SCR, S.D.N.Y.). The employer in *Gorman* had relied heavily on this same argument, pointing out that the security activities could not be integral to a worker's particular primary job because the identical screening was imposed on all workers, regardless of their particular jobs, as well as on non-employees.[12]

Petitioner dismisses the Second Circuit's actual explanation of its decision. "The Second Circuit noted at the very end of its discussion that its holding was bolstered

---

12. Appellee's Brief, *Gorman v. Consolidated Edison Corp.*, No. 2005-6546 (2d Cir), 2006 WL 6263996 at Statement, part A ("anyone entering the plant (employee and nonemployee alike) . . . go[es] through a checking-in process . In order to leave the plant, employees and other visitors to the plant would go[] through the steps of the checking-in process"), text following n. 30 ("[T]he undisputed fact that everyone—and non-employees alike--. . . go[oes] through security in order to gain admittance to the plant undermines Plaintiffs' argument that the procedures were integral to their principal work activities."), n. 27 ("these procedures were followed by everyone who entered and exited the plant, including non-employees").

The court relied on the same reasoning in *Whalen v. United States*, 93 Fed.Cl. 579, 600 (2010)("The security activities for which plaintiffs seek compensation, although necessary for them to travel to [their offices at Edwards Air Force Base], are not integral and indispensable to their principal activities as air traffic controllers . . . [T]he security inspections . . apply to everyone who enters and exits Edwards AFB, whether to work at [the plaintiffs' offices] or elsewhere, or merely to visit persons who live on base.").

by the fact that 'everyone entering the plant' was subject to security screening. [488 F.3d] at 594. But that fact was not remotely dispositive to the court's decision—after all, a nuclear plant does not entertain an abundance of non-employee visitors. There is no question that Respondents' FLSA claims would have been dismissed under the Second Circuit's reasoning in *Gorman*." (Pet. 19-20).[13] But while petitioner may think that the reference to plant visitors was so silly that it cannot really have been a basis of the decision in *Gorman*, the Second Circuit itself believed this was a compelling consideration, as did the district court and the employer in that case. The Second Circuit's argument that the Indian Point practice applied to all visitors, as well as to the large number of employees (such as "canteen workers") who had no access to radioactive material, *is* the "reasoning in *Gorman*"; it clearly does not apply to the activities of respondents in the instant case. The complaint in this case does not suggest, and Integrity does not claim (as it could not in support of a motion to dismiss under Rule 12(b)(6)), that visitors to the Nevada warehouses (for example, UPS deliverymen) or all workers there (e.g., a bookkeeper who ordinarily has no

---

13. Petitioner does not point to anything in the opinions or record in *Gorman* to support its assertion that there are not visitors to the plant. In fact the plant frequently entertains visitors in an apparent attempt to convince the public that the sometimes controversial facility, located near New York City, is perfectly safe. For example, in 2007, following such a visit, Paul Newman issued a statement that "What I saw exceeded my expectations. No Army or Navy based I've ever visited has been more armored, and I couldn't walk 30 feet inside the plant without swiping my key card to go through another security checkpoint." See http://usatoday30.usatoday.com/life/people/2007-05-23-paul-newman_n.htm, last visited Jan 9, 2014.

access to the merchandise in the warehouse) are subject to the extensive anti-theft searches in question.

Petitioner insists that the security screening at Indian Point must actually have been adopted because of the nature of the employees' work, and that the Second Circuit must thus have meant that even security screening that *is* adopted because of the nature of an employee's work is noncompensable.

> The Ninth Circuit also asserted that the security screenings in *Gorman* were not put in place because of 'the nature of the employees' work.' Pet.App.12. That is nonsensical. Employees at the nuclear plant were required to pass through a 'radiation detector, x-ray machines, and explosive material detector' before entering *or exiting* the plant. 488 F.3d at 592. The self-evident purpose of those screenings was to prevent employees from smuggling hazardous materials into or out of the site—materials to which the employees only had access because of the 'nature' of their work.

(Pet. 20)(emphasis in original). But the decision in *Gorman* says no such thing; indeed, one of the Second Circuit's key points is that the searches applied even when "what an employee does [is] mak[e] canteen sandwiches," 488 F.3d at 594, a task that would not give the worker access to any hazardous materials. The searches of individuals entering the plant were aimed at detecting weapons or explosives; those are not items which to employees "only had access because of the 'nature' of their work." Only the armed Indian Point guards would had have access at

work to weapons, and there is no indication that explosives were kept at the plant; both guns and explosives, on the other hand, are available to members of the public from sources outside the plant. The manifest purpose of the radiation screening was to detect accidental leaks and contamination; a worker who attempted to smuggle out a piece of a nuclear fuel rod (assuming it was even physically possible for any worker to access such lethal material) would suffer radiation poisoning that would cause a quick and painful death. At a nuclear power plant, highly enriched uranium is not, like the merchandise on the shelves of an Amazon.com warehouse, just lying around on an open shelf where any of hundreds of employees could just slip some into his or her pocket.

Petitioner repeatedly asserts that *Gorman* holds that "security-related activities" can never be compensable, relying on a particular (notably edited) passage from that opinion. "[T]he Second Circuit has emphasized that 'security-related activities' are '*modern paradigms* of the [non-compensable] preliminary and postliminary activities described in the Portal-to-Portal Act.'" (Pet. 4-5)(quoting *Gorman*)(emphasis added in petition). "The Second Circuit emphasized that 'security-related activities' are 'modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act, in particular, travel time.' [488 F.3d at 593]" (Pet. 18). "[T]he Second Circuit's core holding was that security screenings are '*modern paradigms*' of preliminary or postliminary activities because—even though they may be 'required' for a particular position--they are inherently distinct from the employees' primary job duties." (Pet. 19)(emphasis added in petition). In its parsing of the *Gorman* opinion, the petition suggests that the court of appeals was referring to

"security-related screenings" (or "security screenings") in general, not to any particular type of screening. But in the actual opinion, the Second Circuit's description ("modern paradigms . . ") is a characterization only of the specific practice at the Indian Point Nuclear Power Plant, *not* of all security-related screenings. "The activities required to enter and exit Indian Point . . . are not integral to principal work activities. *These* security-related activities are modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act . ." 488 F.3d at 593 (emphasis added). By omitting the critical limiting adjective "these" from the quoted portion of the Second Circuit opinion, the petition fundamentally changes the meaning of that opinion, from a holding that was actually only about the specific steps taken at Indian Point to a far more sweeping per se rule that any "security-related screening" could not be integral to a worker's primary job.

II. THE NINTH CIRCUIT'S APPLICATION OF ESTABLISHED LEGAL PRINCIPLES TO THE PARTICULAR CIRCUMSTANCES OF THIS CASE DOES NOT WARRANT REVIEW BY THIS COURT

(1) The court of appeals concluded that under the particular facts of this case the time spent by workers participating in the anti-theft searches was indispensable and integral to their primary duties, and thus compensable. Petitioner contends that the Ninth Circuit erred in reaching that conclusion, and that it misapplied the well-established "integral and indispensable" standard. But even if that were so, it would not warrant review by this Court. Petitioner does not suggest that there is a

circuit split regarding whether participation in *anti-theft searches* is compensable activity under the FLSA. To the contrary, this is the first and only appellate decision to face and resolve that questions. This Court does not grant review to address fact-bound claims of error in the application of established legal standards.

(2) The Ninth Circuit correctly held that the anti-theft searches in which workers were required to participate were directly connected and integral to their primary responsibilities. "As alleged, the security clearances are necessary to employees' primary work as warehouse employees .... Integrity allegedly requires the screening to prevent employee theft, a concern that stems from the nature of the employees' work (specifically, their access to merchandise)." (Pet.App. 11-12).[14] The requirement that warehouse workers devote time to participation in the anti-theft searches was clearly tied to their particular jobs. There is no claim that Integrity requires employees who do not have access to such merchandise—such as computer operators at a warehouse, or lawyers and accountants at Integrity's headquarters—to submit to such searches.

Integrity argues that the sole primary duty of the warehouse workers is to fill orders from Amazon.com

---

14. The complaint alleged that "[t]he search was to prevent employee theft, and it is an essential part of the job of a warehouse worker that they not take items from the warehouse out of the warehouse other than in the ways proscribed by the company. In fact, not contributing to 'shrinkage' and abiding by company procedures for inventory control is an integral aspect of the Plaintiffs' job." First Amended Collective and Class Action Complaint, ¶ 15.

customers. But the workers assuredly had other duties, and were subject to other directives, governing the period when they were filling those orders. Employees were doubtless required to avoid breaking merchandise, to wrap and box merchandise in a manner that would assure it arrived safely, to avoid unsafe actions (such as climbing up a ladder in a reckless manner), and—of course—to refrain from putting in their pockets (or otherwise secreting on their persons) merchandise to take home at the end of the day.

Integrity argues that once workers left the part of the warehouse with merchandise and headed for the exits, the productive part of their day had ended. But employers commonly require end-of-shift activities that serve to ensure that earlier on-shift conduct was properly carried out. For example, a worker might be required to review paperwork (or computer records) to check that he or she had in fact properly filled every order; that would not be productive in the same sense as the filling of the order itself, but it would be an important after-the-fact step that was ancillary and necessary to ensuring the earlier activities were performed as required. Similarly, workers might be directed to file at the end of the day reports about breakage or accidents. These activities too would certainly be integral to their duties earlier in the day. Participating in an end-of-shift anti-theft search is in a similar fashion integral to a worker's on-shift duty to refrain from taking Amazon merchandise; it assures that the on-shift activity was properly carried out. Such searches are also directly related to the work of warehouse employees in filling orders, because if merchandise were improperly removed by workers, warehouse employees would subsequently be unable to fill some orders because (unbeknownst to Integrity and Amazon) there would not be sufficient inventory.

Preventing and detecting theft is not a revenue generating activity, but it assuredly is "work of consequence." Integrity obviously has to pay the guards who conduct these searches. For example, if a guard opened up a worker's bag and put the contents on a table to be examined, that clearly would be a compensable activity. The activity remains compensable if the employer required the worker—rather than the guard—to do the same thing. Similarly, just as the action of a guard in patting down a worker to check for items in the worker's pockets would be compensable, so too is the action of the worker in removing those items from his or her pockets so that they can be inspected by a guard. The time that a worker would spend walking through a metal detector is just as compensable as the time a guard would spend achieving the same thing by "wanding" a worker with a metal detector.

(3) Petitioner correctly observes that under the Portal-to-Portal Act a worker is not entitled to compensation "for activities that had nothing to do with [an employee's] actual job duties." (Pet. 13; see *id.* at 22 (worker not entitled to compensation "[i]f a security screening is unrelated to the specific tasks for which a worker is employed . . . "), 25 (no compensation for tasks "that had nothing to do with their actual job duties")). But the anti-theft searches in this case unquestionably had something—indeed everything—to do with the plaintiffs' job duties. A worker's actions are not compensable if engaged in as "merely a convenience to the employee and not directly related to his principal activities," 29 C.F.R. § 790.8(c); but Integrity obviously was not searching the plaintiffs—and imposing a 25 minute delay—for the employees' personal convenience.

Integrity criticizes the Ninth Circuit's application of the "indispensable and integral" standard to the particular circumstances of this case. "The Ninth Circuit suggested that the security screenings were compensable under the FLSA because they 'stem[] from the nature of the employees' work (specifically their access to merchandise).' Pet.App. 12. [T]he Ninth Circuit's reasoning proves far too much: such quintessential preliminary and postliminary activities as the need to shower or change clothes may 'stem[] from the nature of the employees' work,' and yet such tasks are clearly non-compensable." (Pet. 14). To the contrary, changing clothes and showering can be compensable under appropriate circumstances. Those very circumstances were present in *Steiner*, which held that clothes changing and showering were indeed compensable activities at the plant in question. "[I]t would be difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of the principal activity of the employment than in the case of these employees." *Steiner*, 350 U.S. at 256. [15]

Petitioner also argues that an activity can be "integral" to a principal activity if only "the work *could not be done* without it." (Pet. 18-19 (emphasis in original)). But in *Steiner* it certainly would have been possible for the employees do their jobs operating the plant there in question without putting on the "old clean work

15. *See* 350 U.S. at 252 ("petitioners have equipped [the plant] with shower facilities and a locker room with separate lockers for work and street clothing. Also, they furnish without charge old but clean work clothes which the employees wear. The cost of providing their own work clothing would be prohibitive for the employees, since the acid causes such rapid deterioration that the clothes sometimes last only a few days.")

clothes" provided by the employer or without taking showers at the end of the day. 350 U.S. at 252. Similarly, in *IBP* the Court upheld the compensation claims of workers at a meatpacking plant who had to put on items such as chain link aprons, hardhats, hairnets, earplugs, vests, leggings, armguards and gloves. 546 U.S. at 30. It is obviously possible to slaughter or butcher a cow or pig without putting on such safety gear; human beings have been doing so for thousands of years, and continue to do so today in countries which lack modern safety standards.

Petitioner notes that in *IBP* the Court held that the workers were not entitled to compensation for time spent at the beginning of the day waiting to don that safety gear. (Pet. 9, 16). But that waiting time was noncompensable because it occurred at the beginning of the workday, prior to the first compensable activity—the donning of the gear. 546 U.S. at 38-42. Waiting time that occurs after the first principal activity, but before the last principal activity, *is* compensable under the continuous workday rule. For that reason, the employer in *IBP* did not dispute its liability for time workers spent at the end of the day waiting to take off the safety gear. In the instant case the time workers spend waiting for the anti-theft search is indistinguishable from the time workers in *IBP* spent at the end of the day waiting to doff their safety gear.

III. THIS CASE PRESENTS NO IMPORTANT ISSUE WARRANTING REVIEW BY THIS COURT

(1) The petition greatly overstates the importance of this case. The Ninth Circuit decision would not affect the vast majority of the "security screenings" in the United States. Most of those screenings (as in *Bonilla* and

Gorman) are required of everyone entering an office or plant, and have nothing to do with what job an individual has or whether the screened individual is an employee at all. The U.S. Chamber of Commerce notes that for "most employers doing business in high-security environments (*e.g.*, airports, skyscrapers, and government buildings) . [the] security perimeters usually coincide with a building's or a facility's physical boundaries."[16] Those are precisely the screenings that clearly would not be compensable under the decision below. The amicus brief filed by several municipal organizations asserts that "[t]he Ninth Circuit's decision requires some [government] employees to be compensated" for time passing through screenings at government buildings established to "ensur[e] the safety and security of important government assets and deterring workplace violence."[17] But that brief does not even attempt to explain how the Ninth Circuit decision could possibly be interpreted to apply in such situations, and the petition does not claim that it would. Without question submitting to the commonplace searches at the entrances of government buildings would not be compensable activity under the standard in any circuit.

Even where a particular screening is indispensable and integral to a principal activity under the Ninth Circuit decision, the affected employees often still would not be entitled to compensation. The screenings themselves ordinarily take well under a minute; an

---

16. Brief of the Retail Litigation Center, Inc., Chamber of Commerce of the United States, et al, as *Amici Curiae* in Support of Petitioner, 12-13.

17. Brief for *Amici Curiae* International Municipal Lawyers Ass'n, et al., in Support of Petitioner, 23.

activity of such brief duration would be de minimis and thus noncompensable. Screening-based FLSA claims have routinely been dismissed on that basis. *E.g., Alvarado v. Costco Wholesale Corp.*, 2008 WL 2477393 (N.D. Cal. June 18, 2008). In the instant case, for example, the workers also went through some form of "security clearance" on the way to lunch. Because (unlike the end-of-shift search) the workers were not subject to significant delays awaiting that screening, the Ninth Circuit held that this claim was properly dismissed, reasoning that "[t]he relatively minimal time extended in this context differs from the 25-minute delay alleged for employees passing through security at day's end." (Pet.App. 16). In the instant case the de minimis rule did not apply to the post-shift anti-theft search process because Integrity required the warehouse workers to endure a truly extraordinarily lengthy 25 minute delay just to leave the building where they worked. The brief filed by the Chamber of Commerce is notable for what it does *not* say in this regard; the major national business organizations which submitted that brief at no point suggest that employers commonly engage in that sort of abusive practice. Indeed, the brief does not assert that any of the 300,000 members of the United States Chamber of Commerce, or any of the thousands of members of the National Association of Manufacturers, treat their employees in that manner. The Chamber does argue that, if an employer's current practices did fall within the scope of the Ninth Circuit decision, it might be difficult to restructure a facility to put the time clock at a location past where the screenings occur.[18] But such an employer could avoid liability by doing what most employers probably already do: hire enough screeners that

18. *Id.* 12-13.

departing workers do not endure more than de minimis delays, or stagger the times when shifts end in order to avoid significant delays.

Petitioner argues that the Ninth Circuit's decision has disrupted what until now was "a settled area of the law." (Pet. 5). But that assertion rests on petitioner's contention that *Bonilla* and *Gorman* adopted a per se rule that all forms of screening are noncompensable. As we explained above, neither the Second Circuit nor the Eleventh Circuit adopted such a rule. The compensability of time spent during post-shift anti-theft searches is assuredly not a "settled area of the law." To the contrary, the Ninth Circuit decision in this case is the first appellate case ever to address that issue.

Petitioner urges this Court to grant review to establish a "uniform rule" governing the type of security screening at issue in this case, arguing that firms which do business in several circuits need this Court to create a definitive national rule. (Pet. 5, 23, 28). But there is no circuit conflict about that issue. It assuredly is not the practice of this Court to grant certiorari as soon as the first decision regarding any question of substantive federal employment law is decided by any court of appeals. Moreover, because at least virtually all states have their own statutes imposing some form of overtime compensation obligation, national firms will always be subject to varying standards. For example, the California statute regarding overtime is clearly broader than the FLSA, treating as compensable the entire period when a worker is under the "control" of an employer, regardless of what (if anything) he or she may be doing. *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 586 (2000). For that reason, in California a worker is

entitled to compensation for any time during (or waiting for) a post-shift screening, regardless of whether the screening would be compensable under the FLSA. See *Cervantez v. Celestica Corp.*, 618 F.Supp. 2d 1208, 1218-19 (C.D.Cal. 2009).[19] Similarly, Nevada has not adopted provisions like those in the federal Portal-to-Portal Act.

(2) Petitioner's assertion that in the wake of the Ninth Circuit "plaintiffs are already flocking to the Ninth Circuit to obtain a favorable forum for FLSA claims for time spent in security screenings" (Pet. 23) is similarly overstated.[20]

The petition asserts that in the instant case "[r]espondents have now expanded their complaint from warehouses in Nevada" to employees "throughout the United States." (Pet. 27). But the earlier complaint in this action, filed in 2010, already was framed as a nationwide collective action. First Amended Collective and Class Action Complaint, ¶ 21 ("[a]ll persons employed by Defendant as hourly warehouse employees within the United States").

---

19. In the instant case the parties litigated, but the court of appeals did not decide, whether Nevada would interpret its own overtime compensation statute in the same manner as the California statute. See Opening Brief of Appellants Jesse Buck and Laurie Castro, 2011 WL 9684071 at 36-38.

20. As we explained above, FLSA actions are opt-in collective actions, not Rule 23 opt-out class actions. Petitioner does not claim that any workers have yet opted in to any of the actions to which they refer.

Similarly, the petition asserts that "since the decision below was issued, plaintiffs' lawyers have brought [a] nationwide class action[] against CVS." (Pet. 5). Petitioner elsewhere in the petition concedes that the suit against CVS was actually filed in September 2012, prior to the Ninth Circuit decision, but asserts that "[t]he plaintiffs have now filed an amended complaint in which they seek damages on behalf of a nationwide class of employees at CVS distribution centers." (Pet. 26). In fact, however, the original suit filed prior to the Ninth Circuit decision was already a collective action seeking joinder of CVS employees "[n]ationwide." *Ceja-Corona v. CVS*, 2013 WL 796649 at *2 and *9 (Mar. 4, 2013). The plaintiffs in *Ceja-Corona* filed an amended complaint only because, in the wake of the decision below, the district court dismissed the original complaint on the ground that its allegations were insufficient under the Ninth Circuit decision in the instant case. *Id.* *7-*9.

The suits against *Amazon.com* relied on by petitioner (Pet. 27 n. 4) largely overlap with the nationwide claim already asserted in the instant lawsuit, which was of course filed several years before the Ninth Circuit decision. The fact that some actions are being filed in federal courts in California is doubtless the result of the fact that California's overtime statute is more favorable to plaintiffs than is the FLSA.[21]

A majority of the new lawsuits cited in the brief of the International Municipal Lawyers Association were

---

21. For example, the complaint in *Frelkin v. Apple, Inc.*, No. 13-cv-3451-WHA (N.D.Cal.), in addition to raising claims under the FLSA, asserts claims under the California statutes and requests certification of a class of consisting of California employees. Plaintiffs' First Amended Complaint, 15-17, 37-38.

actually filed in district courts outside the Ninth Circuit.[22] It would be appropriate to let this issue percolate in the lower courts, to permit them to air the various issues raised by anti-theft searches and screening, and to allow the development of factual records revealing the actual nature of these practices. It is unclear, for example, whether lengthy pre-screening delays are sufficiently common that the compensability of anti-theft searches and screening is an important and recurring issue. Future clarification of the standards under governing state laws may limit the significance of the FLSA's own requirements.

CONCLUSION

For the above reasons, the petition should be denied.

Respectfully submitted,

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. Box 353020
Seattle, Washington 98195
(206) 616-3167

MARK R. THIERMAN
Counsel of Record
JOSHUA D. BUCK
THIERMAN LAW FIRM, P.C.
7287 Lakeside Drive
Reno, Nevada 89511
(775) 284-1500
mark@thiermanlaw.com

Counsel for Respondents

22. Brief for *Amici Curiae* International Municipal Lawyers Ass'n., et al., in Support of Petitioner, 16.

REPLY BRIEF

No. 13-433

In the
Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC.,

Petitioner,

v.

JESSE BUSK and LAURIE CASTRO, on behalf of themselves and all others similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

NEIL M. ALEXANDER
RICK D. ROSKELLEY
ROGER L. GRANDGENETT II
CORY GLEN WALKER
LITTLER MENDELSON
3960 Howard Hughes Parkway, Suite 300
Las Vegas, NV 89169
(702) 862-8800

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

January 28, 2014

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. The Ninth Circuit's Decision Flouts Congress' Express Intent In The Portal-to-Portal Act, DOL's Regulations, And This Court's Precedents 2

II. The Ninth Circuit's Decision Conflicts With Decisions Of The Second And Eleventh Circuits 5

III. The Decision Below Will Have Far-Reaching Implications And Has Already Spawned Numerous Class-Action Suits Against Major Employers. 10

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Anderson v. Perdue,
604 F. Supp. 2d 1339 (M.D. Ala. 2009) 9, 10

Bonilla v. Baker Concrete,
487 F.3d 1340 (11th Cir. 2007) 9

Ceja-Corona v. CVS,
No. 12-1868, 2013 WL 796649
(E.D. Cal. Mar. 4, 2013) 12

Ceja-Corona v. CVS,
No. 12-1868, 2013 WL 3282974
(E.D. Cal. June 27, 2013) 12

Gorman v. Consolidated Edison,
488 F.3d 586 (2d Cir. 2007) 6, 7, 8

IBP v. Alvarez,
546 U.S. 21 (2005) 3

Sandifer v. United States Steel,
No. 12-417, slip op. (Jan. 27, 2014) 2

Sleiman v. DHL,
No. 09-0414, 2009 WL 1152187
(E.D. Pa. Apr. 27, 2009) 10

Steiner v. Mitchell,
350 U.S. 247 (1956) 1, 3

White v. Tip-Top Poultry,
No. 07-0101, 2008 U.S. Dist. LEXIS 110598
(N.D. Ga. Oct. 7, 2008) 10

Regulations

29 C.F.R. § 790.7(g) 5

29 C.F.R. § 790.8(a) 4

Other Authorities

AtomicArchive.com,
http://www.atomicarchive.com/Almanac/Smuggling_details.shtml 8

Kase, *Amazon Workers Want Pay for Time Spent at Security Checkpoint* (Apr. 25, 2013), *at* http://blogs.lawyers.com/2013/04/amazon-workers-want-pay-for-time-at-security/ 11

Motion for Transfer and Consolidation, *In re Amazon.com Wage and Hour Litig.*, No. MDL-2504 (Oct. 12, 2013) 11

Order, *Jones v. Best Buy*, No. 12-cv-95 (D. Minn. Apr. 12, 2012) 10

REPLY BRIEF FOR PETITIONER

Until the Ninth Circuit's decision in this case, no court had ever held that security screenings were compensable activities under the Fair Labor Standards Act ("FLSA"), and many courts had held that they were not. Under the FLSA, as amended by the Portal-to-Portal Act of 1947, preliminary or postliminary activities are compensable only if they are "integral and indispensable" to an employee's principal work activities. *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). Several courts, including the Second and Eleventh Circuits, have correctly recognized that security screenings are not covered by the FLSA because they are fundamentally distinct from employees' actual job duties.

The Ninth Circuit's opinion in this case conflicts with those decisions and badly misconstrues the FLSA and this Court's precedents. Respondents largely ignore the Ninth Circuit's actual reasoning, as well as the text and history of the Portal-to-Portal Act and the Labor Department's regulations. Instead, Respondents make the remarkable argument that "anti-theft" security screenings, unlike other security screenings, are compensable because they are integral and indispensable to the principal job activity of not stealing employer property. That is nonsense. "Not breaking the law" is a society-wide legal obligation, not a job activity. The proper inquiry is whether the activities in question were integral and indispensable to the employee's *productive work*—a test that security screenings do not remotely satisfy.

Respondents seek to downplay the importance of the Ninth Circuit's decision, but they do not dispute

that plaintiffs are *already* taking advantage of that decision by filing nationwide class-action claims against major employers—including Amazon.com, Apple, and CVS—seeking hundreds of millions of dollars of damages and penalties for time spent in security screenings. Many of those complaints have been filed in jurisdictions within the Ninth Circuit to take advantage of that court's unequivocally pro-plaintiff rule.

Respondents do not identify any vehicle problems or obstacles to this Court's review. Certiorari is warranted to correct the Ninth Circuit's deeply flawed interpretation of the FLSA and restore uniformity to this critical area of the law.

I. The Ninth Circuit's Decision Flouts Congress' Express Intent In The Portal-to-Portal Act, DOL's Regulations, And This Court's Precedents.

Congress enacted the Portal-to-Portal Act in 1947 to repudiate expansive judicial interpretations of the FLSA under which employees would be entitled to compensation for all time in which they were "'necessarily required to be on the employer's premises,'" even if they were not engaged in productive work. *See Sandifer v. United States Steel*, No. 12-417, slip op. at 3-5 (Jan. 27, 2014) (summarizing history of Portal-to-Portal Act). Under the Portal-to-Portal Act and this Court's precedents, mandatory presence on the employer's premises for the employer's benefit is not enough. Instead, the test focuses on the nature of the activity in question. "Preliminary" and "postliminary" activities are compensable only if they are an "integral and

indispensable part of the principal activities for which covered workmen are employed." *Steiner*, 350 U.S. at 256.

Respondents ignore Integrity's extensive discussion of the history of the Portal-to-Portal Act. Pet.6-9, 13-17. And they make no serious attempt to explain how the Ninth Circuit's mandatory-presence-for-employer's-benefit approach to the FLSA is consistent with the Act and this Court's precedents, as opposed to being consistent with the discarded test of the *ancien regime*. Under the Portal-to-Portal Act, the question is not simply whether the employer "requires" a certain activity, but whether that activity is integral to the *principal job duties* the worker is employed to perform. *Steiner*, 350 U.S. at 256; *see IBP v. Alvarez*, 546 U.S. 21, 40-41 (2005) (fact that preshift activities are "necessary" does not necessarily mean they are "integral and indispensable" to principal job activities). Respondents' FLSA claims should have been dismissed because the security screenings alleged in their complaint are neither "integral" nor "indispensable" to Respondents' principal activities of processing and filling online orders.

Rather than defending the Ninth Circuit's test, Respondents argue (at 19-20) that the decision below was correct because anti-theft security screenings are integral and indispensable to the job duty of "refrain[ing] from putting in their pockets ... merchandise to take home at the end of the day." That assertion is stunning. No court, including the Ninth Circuit below, has adopted that reasoning. Employees have an obligation not to steal because it is against the law, not because it is one of the job duties they are paid

to perform. In order to be compensable, a task must be integral and indispensable to employees' principal activities—*i.e.*, their "work of consequence" or "productive work." 29 C.F.R. § 790.8(a). Refraining from committing a crime is a society-wide obligation, not part of an employee's *productive work* for purposes of the FLSA.[1]

Respondents (at 20) are equally wrong to equate security screenings with compensable end-of-shift activities such as completing paperwork or maintaining records. Each of Respondents' hypotheticals involves work that is performed to *verify the extent to which principal activities have been completed*. They are thus self-evidently integral and indispensable to the worker's principal activities. But no such nexus exists for the security screenings at issue here—unless one accepts Respondents' deeply flawed suggestion that "not stealing" is a principal job activity.

The proper analog to a security screening—which Respondents ignore altogether—is the process of checking in at the beginning of each workday. Pet.9, 16-17. Waiting in line for a security screening is no different from waiting in line to punch the clock before starting work. Both activities are generally required by the employer and done for the employer's benefit, but neither has anything to do with an employee's principal job duties. For this reason, the Department

---

[1] The Ninth Circuit similarly erred by characterizing Respondents' principal job activities as an amorphous "access to merchandise," Pet.App.12, rather than focusing on the productive work they were hired to perform—namely, filling and processing online orders. Pet.14-15.

of Labor has long identified "checking in and out and waiting in line to do so" as an illustrative example of a non-compensable activity. 29 C.F.R. § 790.7(g). Respondents do not even attempt to reconcile the Ninth Circuit's decision with this regulation.

Respondents also contend (at 21) that security screenings must be "work of consequence" for warehouse workers because the security guards who perform these screenings are paid for doing so. That is a *non sequitur*. Security guards are hired and paid to perform security screenings, so the screening activities are obviously a core component of their principal job duties.[2] The same cannot be said for warehouse workers whose primary job activities involve filling and processing customer orders. Certainly, the fact that one employee might be hired to oversee the clocking-in-and-out process would not make that time compensable for every employee. The same commonsense result follows here.

II. The Ninth Circuit's Decision Conflicts With Decisions Of The Second And Eleventh Circuits.

The Ninth Circuit's decision conflicts with decisions from the Second and Eleventh Circuits. Pet.18-23. Respondents' effort to draw a sharp distinction between the "anti-theft" screening here and the screenings in those cases is neither legally nor factually sustainable.

---

[2] Respondents assert (at 4, 21) that Integrity is responsible for hiring security guards and dictating how the screenings are conducted. No such allegations are present in the complaint.

A. In *Gorman v. Consolidated Edison*, the Second Circuit held that time spent by nuclear-plant employees in "ingress and egress security procedures" was not compensable under the FLSA. 488 F.3d 586, 593-94 (2d Cir. 2007). The court's core holding was that "security-related activities" are "modern paradigms" of non-compensable activities because they are not integral and indispensable to workers' job duties. *Id.* at 593.

Respondents (at 17-18) accuse Integrity of selectively quoting the "modern paradigm" language, but the Second Circuit's decision speaks for itself:

> The activities required to enter and exit Indian Point—from waiting in line at the vehicle entrance through the final card-swipe and handprint analysis—are necessary in the sense that they are required and serve essential purposes of security; *but they are not integral to principal work activities*. These security-related activities are modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act, in particular, travel time.

Id. (emphasis added).

The key word in this passage was not "these," as Respondents weakly suggest (at 18). The Second Circuit was making a broader point that "security-related activities" are simply not "integral" to employees' actual job functions, and are paradigmatically non-compensable. Indeed, the court emphasized that "waiting in line" for a security screening—which is precisely what Respondents

allege here—is not compensable. *Id.* And the Second Circuit could conceive of only a single, narrow situation in which security screenings *would* be compensable—namely, when the employee in question is "responsible for monitoring, testing, and reporting on the plant's infrastructure security." *Id.* at 593 n.5.

Respondents contend (at 13-16) that *Gorman* is distinguishable because everyone at the nuclear plant, even canteen workers, had to go through security screenings, regardless of the person's job. Here in contrast, Respondents suggest that not all visitors to Amazon.com warehouses are "subject to the extensive anti-theft searches." Tellingly, Respondents cite nothing in support of that assertion. Nor could they. The fact that Respondents' complaint makes no such allegation underscores that their claim to compensation does not turn on the ubiquity of the security screening. If employees are subjected to screening on the employer's premises for the employer's benefit, that is enough for the Ninth Circuit. Moreover, if non-universal security screenings are more likely to be compensable under the FLSA—as Respondents contend—then this will create a perverse incentive for employers to screen everyone, even if there is no business reason for doing so. Such a rule would hardly serve the purposes of the FLSA.

In all events, Respondents overstate the importance of this fact to the Second Circuit's decision. The statement about "everyone" being screened was a single sentence at the very end of the court's discussion of whether security screenings were compensable under the FLSA. *See id.* at 594. If the

screenings were limited only to employees with access to particularly sensitive parts of the facility, it is inconceivable that the decision would have come out differently.

Finally, Respondents argue (at 16-17) that *Gorman* is distinguishable because the exit screenings at the nuclear plant were not related to the "nature" of the employees' work. Respondents speculate that the egress screenings were not intended to prevent hazardous materials from being taken out of the plant, but were only designed to detect leaks and contamination. Even if that proposition were true, the radiation screenings would still reflect the "nature" of the employees' work. But in all events, it is not true. As the Second Circuit explained, employees went through an extensive screening process on the way into the plant, including "waiting in line and passing through a radiation detector, x-ray machine, and explosive material detector." *Id.* at 592. On the way out of the plant, workers did "many of these things in reverse," and also underwent a "more sensitive" "egress radiation-test." *Id.* at 592 & n.2. An obvious purpose of the exit screenings—like the screenings at issue in this case—was to ensure that materials were not improperly taken from the plant.[3]

---

[3] Respondents speculate (with no citation) that nuclear materials were not "just lying around" and that workers could not remove such materials without suffering "a quick and painful death." *But see* http://www.atomicarchive.com/Almanac/Smuggling_details.shtml (documenting 16 incidents of individuals smuggling nuclear materials out of secure facilities).

B. Respondents' attempts to distinguish *Bonilla v. Baker Concrete*, 487 F.3d 1340 (11th Cir. 2007), are equally unavailing.

The most important aspect of *Bonilla*—which Respondents ignore altogether—is the court's rejection of a simple but-for test such as the one the Ninth Circuit adopted here. The plaintiffs in *Bonilla* argued that they were entitled to compensation for time spent in security screenings because the screenings were "necessary" "in order to do their jobs." *Id.* at 1344. But the Eleventh Circuit squarely rejected a test of "mere causal necessity," emphasizing that this rule would allow the Portal-to-Portal Act to be "swallowed by an all-inclusive definition of 'integral and indispensable.'" *Id.* The decision below essentially adopted the kind of over-inclusive approach *rejected* by the Eleventh Circuit, holding that the screenings were compensable because they were "require[d]" by the employer and done on the employer's premises for the employer's benefit. Pet.App.11-12.

Respondents assert (at 9-10) that *Bonilla* did not establish a general rule that security screenings were non-compensable and instead rested on the "very specific rationale" that FAA-mandated airport screenings are not imposed for the "'benefit of the employer.'" But district courts within the Eleventh Circuit and elsewhere have uniformly viewed *Bonilla* (and *Gorman*) as establishing a broader rule. For example, in *Anderson v. Perdue*, 604 F. Supp. 2d 1339, 1359 (M.D. Ala. 2009), the court dismissed FLSA claims seeking compensation for time spent in employer-imposed security screenings at a chicken

plant. Citing *Bonilla* and *Gorman*, the court concluded that "*[t]he law is clear* that Plaintiffs are not entitled to compensation for this time." *Id.* (emphasis added).[4]

III. The Decision Below Will Have Far-Reaching Implications And Has Already Spawned Numerous Class-Action Suits Against Major Employers.

Respondents contend (at 18-19) that this case does not warrant the Court's review because the Ninth Circuit's decision was limited to "the particular facts of this case." But that assertion is belied by the diverse array of *amici* that have supported Integrity's petition. A group of private-sector *amici*—representing retailers, manufacturers, human resources professionals, and the Chamber of Commerce—have emphasized the "potential for significant and completely unanticipated financial liability for thousands of employers throughout the United States who either use security screening themselves or who have employees who must otherwise undergo such screening." Br. of Retail Litigation Center *et al.* at 9. Similarly, a coalition of public-sector groups has detailed how the Ninth Circuit's approach to the FLSA "invites, and indeed encourages, future litigation seeking compensation for mundane and inconsequential tasks traditionally

---

[4] *Accord Sleiman v. DHL*, No. 09-0414, 2009 WL 1152187, at *5-*6 (E.D. Pa. Apr. 27, 2009) (relying on *Gorman* and *Bonilla* to dismiss claims involving employer-imposed security screenings); Order at 6, *Jones v. Best Buy*, No. 12-cv-95 (D. Minn. Apr. 12, 2012) (same); *White v. Tip-Top Poultry*, No.07-0101, 2008 U.S. Dist. LEXIS 110598, at *32-33 n.5 (N.D. Ga. Oct. 7, 2008) (same).

understood to be non-compensable." Br. of Int'l Municipal Lawyers Ass'n *et al.* at 4.

Respondents do not, and cannot, dispute that the Ninth Circuit's decision has already triggered a flood of class-action suits against major employers. Pet.25-28. For Amazon.com and its staffing companies *alone*, the putative class includes more than 400,000 plaintiffs, and Respondents' counsel has boasted that "'we're talking hundreds of millions of dollars'" in damages.[5]

Respondents contend (at 29) that this issue should be allowed to "percolate in the lower courts." But percolation is unlikely to result in any further development of the law because of the FLSA's provisions allowing nationwide actions. With the Ninth Circuit's strongly pro-plaintiff rule, there is no good reason for a plaintiff to sue an employer with employees in the Ninth Circuit anywhere else. Indeed, Respondents are currently seeking to have several other class-action complaints against Amazon.com and Integrity (including cases originally filed in Kentucky and Tennessee) consolidated in Nevada to take advantage of the Ninth Circuit's decision. *See* Motion for Transfer and Consolidation, *In re Amazon.com Wage and Hour Litig.*, No. MDL-2504 (Oct. 12, 2013).

Nationwide class-action suits have also been brought against Apple, CVS, and other major employers. Pet.26-27. Respondents claim (at 28) that

---

[5] Kase, *Amazon Workers Want Pay for Time Spent at Security Checkpoint* (Apr. 25, 2013), http://blogs.lawyers.com/2013/04/amazon-workers-want-pay-for-time-at-security/.

the CVS case is irrelevant because it was filed before the Ninth Circuit's decision. Critically, however, it was both filed *and dismissed* before the decision below, on the strength of *Gorman* and *Bonilla*. *See Ceja-Corona v. CVS*, No. 12-1868, 2013 WL 796649, at *8-*9 (E.D. Cal. Mar. 4, 2013) (citing *Gorman* and *Bonilla*). But, after the Ninth Circuit's decision in this case, the district court reversed itself and allowed the plaintiffs' claims to proceed. *See* 2013 WL 3282974 (June 27, 2013). It is difficult to imagine a stronger indication that *Gorman* and *Bonilla* conflict with the Ninth Circuit's decision in this case, and that future cases will be filed in the Ninth Circuit, rather than the Second and Eleventh.

Respondents suggest (at 26-27) that it would be pointless for this Court to address whether the FLSA applies to security screenings because plaintiffs could bring similar claims under state law even if federal claims were unavailable. But in all manner of contexts, states have statutory and constitutional provisions that parallel federal provisions and could be interpreted more generously, yet that never stops this Court from addressing a federal question on which courts are split. Moreover, any state provision that deviates from the FLSA to require compensation will not have the same devastating effect on employers. It is no accident that Respondents sought a nationwide class for their FLSA claims, but limited their Nevada-law claims to a class of Nevada employees.

Finally, Respondents contend (at 24-25) that many security-screening claims would ultimately fail on the merits if the screenings took only a *de minimis*

amount of time. But that is cold comfort for employers. The Ninth Circuit's approach ensures that nearly all FLSA claims for time spent in security screenings will survive a motion to dismiss. At that point, employers will face a powerful incentive to settle even frivolous claims, rather than face months (or years) of costly and time-intensive discovery. The Ninth Circuit's decision effectively guarantees that plaintiffs' lawyers will be able to extract settlements from employers even if their claims would have ultimately failed on the merits.

CONCLUSION

The Ninth Circuit's decision is a glaring outlier in what had been a settled area of the law. That decision badly misconstrues the Portal-to-Portal Act and this Court's precedents, and is already having negative consequences as plaintiffs flock to the Ninth Circuit to file class-action suits against major employers. The petition should be granted.

Respectfully submitted,

NEIL M. ALEXANDER
RICK D. ROSKELLEY
ROGER L. GRANDGENETT II
CORY GLEN WALKER
LITTLER MENDELSON
3960 Howard Hughes
Parkway, Suite 300
Las Vegas, NV 89169
(702) 862-8800

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

January 28, 2014

AMICUS CURIAE BRIEF

No. 13-433

IN THE

Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC.,
Petitioner,

v.

JESSE BUSK and LAURIE CASTRO, on behalf of themselves and all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION IN SUPPORT OF PETITIONER

JAMES C. HO
Counsel of Record
ASHLEY E. JOHNSON
ANDREW P. LEGRAND
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Dallas, TX 75201
(214) 698-3100
jho@gibsondunn.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. The Ninth Circuit's Decision Will Significantly Harm State and Local Governments 4

A. The Ninth Circuit's Decision Splits from the Second and Eleventh Circuits on Materially Indistinguishable Facts. 6

B. The Ninth Circuit's Disregard of Whether the Activity at Issue Was "Integral" Is Irreconcilable with This Court's Precedent 10

C. The Ninth Circuit's Decision Invites a Flood of FLSA Litigation and Poses a Substantial Threat to Employers 13

D. The Ninth Circuit's Decision Could Decimate State and Local Government Coffers 19

II. The Court Should Not Delay Ruling on These Important Matters 23

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Allison v. Amazon.com, Inc.,
No. 2:13-cv-1612
(W.D. Wash. Sept. 6, 2013) 16

Alvarez v. IBP, Inc.,
339 F.3d 894 (9th Cir. 2003),
aff'd, 546 U.S. 21 (2005) 8

Alvarez v. IBP, Inc.,
No. CT-98-5005-RHW, 2005 WL
3941313 (E.D. Wash. Dec. 20, 2005) 18

Anderson v. Mt. Clemens Pottery Co,
328 U.S. 680 (1946) 5

Anderson v. Perdue Farms, Inc.,
604 F Supp. 2d 1339 (M.D. Ala. 2009) 15

Bamonte v. City of Mesa,
598 F.3d 1217 (9th Cir. 2010) 5, 13

Bonilla v. Baker Concrete Const., Inc.,
487 F.3d 1340 (11th Cir. 2007) 8, 15, 17

Ceja-Corona v. CVS Pharmacy, Inc.,
No. 1:12-cv-1868, 2013 WL 3282974
(E.D. Cal. June 27, 2013) 16

Ceja-Corona v. CVS Pharmacy, Inc.,
No. 1:12-cv-1868, 2013 WL 796649
(E.D. Cal. Mar. 4, 2013) 16

Craig v. Rite Aid Corp.,
13 N.W. Pers. Injury Litig. Rep. 53,
2013 WL 1397751
(M.D. Pa. Jan. 7, 2013) 17

Davis v. Amazon.com, Inc.,
No. 3:13-cv-1091
(M.D. Tenn. Oct. 4, 2013).....16

Franklin v. Kellogg Co.,
619 F.3d 604 (6th Cir. 2010).....13

Frlekin v. Apple, Inc.,
No. 3:13-cv-3451
(N.D. Cal. July 25, 2013) 16

Garcia v. San Antonio Metropolitan Transit Authority,
469 U.S. 528 (1985).....21

Gibson v. Amazon.com, Inc.,
No. 3:13-cv-1136
(M.D. Tenn. Oct. 11, 2013).....16

Gorman v. Consol. Edison Corp.,
488 F.3d 586 (2d Cir. 2007) .....*passim*

Hultgren v. Cnty. of Lancaster, Neb.,
913 F.2d 498 (8th Cir. 1990).....9

IBP, Inc. v. Alvarez,
546 U.S. 21 (2005).....5, 11, 12

Johnson v. Amazon.com, Inc.,
1:13-cv-153 (W.D. Ky. Sept. 17, 2013).....16

Jones v. Best Buy Co., Inc.,
No. 0:12-cv-95
(D. Minn. Apr. 12, 2012) 15

Kalin v. Apple, Inc.,
No. 3:13-cv-04727
(N.D. Cal. Oct. 10, 2013) 16

Kilker v. Apple, Inc.,
No. 3:13-cv-3775
(N.D. Cal. Aug. 14, 2013) 16

Mitchell v. King Packing Co.,
350 U.S. 260 (1956) 11

Morgan v. Family Dollar Stores, Inc.,
551 F.3d 1233 (11th Cir. 2008) 18

Perez v. Mountaire Farms, Inc.,
650 F.3d 350 (4th Cir. 2011) 13

Rosenthal v. Amazon.com, Inc.,
No. 1:13-cv-1701
(D. Del. Oct. 15, 2013) 16

Sleiman v. DHL Express,
No. 09-0414, 2009 WL 1152187
(E.D. Pa. Apr. 27, 2009) 15

Smith v. Aztec Well Servicing Co.,
462 F.3d 1274 (10th Cir. 2006) 6

Steiner v. Mitchell,
350 U.S. 247 (1956) ..... *passim*

Suggars v. Amazon.com, Inc.,
No. 3:13-cv-906
(M.D. Tenn. Sept. 9, 2013) 16

Vance v. Amazon.com, Inc.,
No. 3:13-cv-765
(W.D. Ky. Aug. 1, 2013) 16

Whalen v. United States,
93 Fed. Cl. 579 (Fed. Cl. 2010) 15

STATUTES AND LEGISLATIVE HISTORY

131 Cong. Rec. 4191-01 (1985) 22

29 U.S.C. § 207 22

29 U.S.C. § 251 14

29 U.S.C. § 254 5

Pub. L. No. 99–150, 99 Stat. 787 (1985) 22

S. Rep. No. 99-159 (1985) 21, 22

OTHER AUTHORITIES

9th Circuit Court of Appeals Says Amazon's Warehouse Workers Must Be Paid for Security Check Point Time, Business Wire, (Apr. 12, 2013 6:57 PM), http://www.businesswire.com/news/home/20130412005934/en/9th-Circuit-Court-Appeals-Amazon%E2%80%99s-Warehouse-Workers 20

Baker, Deirdre, *Annual Survey of Public Employment & Payroll Summary Report*: 2011 2–3 (Aug. 22, 2013), *available at* http://www2.census.gov/govs/apes/2011_summary_report.pdf 19, 20

Biggest Municipal Bankruptcies in U.S. History, Forbes, http://www.forbes.com/pictures/ejii45efkm/the-5-biggest-municipal-bankruptcies-in-u-s-history/ (last visited Oct. 30, 2013) 21

Cronin Fisk, Margaret, *Wal-Mart Will Pay Up to $640 Million in Settlement*, Bloomberg (Dec. 23, 2008, 18:57 EST), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aX6vHzFR2avg 17

Erickson, Elizabeth, & Ira Mirsky, *Employers Responsibilities When Making Settlements in Employment-Related Claims*, Bloomberg Law Reports (2009), http://www.mwe.com/info/pubs/Bloomberg_Employers.pdf.....17

FLSA Cases in Federal Court, Seyfarth Shaw LLP (2012), http://op.bna.com/dlrcases.nsf/id/kmgn-8wkkf7/$File/FLSAchart.pdf 14

Hess, Alexander E.M., *The 10 Largest Employers in America*, USA Today (Aug. 22, 2013, 7:48 AM), http://www.usatoday.com/story/money/business/2013/08/22/ten-largest-employers/2680249/ 19

I.B.M. Agrees to Pay $65 Million to Settle Dispute on Overtime, N.Y. Times (Nov. 23, 2006), http://www.nytimes.com/2006/11/23/technology/23IBM.html 17

LaCroix, Kevin, *Wage and Hour Suit Filings at All-Time High*, LexisNexis, (July 30, 2012, 12:48 PM), http://www.lexisnexis.com/legalnewsroom/securities/b/securities/archive/2012/07/30/wage-and-hour-suit-filings-at-all-time-high.aspx.....14

McGowan, Kevin P., *FLSA Lawsuits Hit Record High in 2012, Continuing Recent Trend of Sharp Growth*, Bloomberg BNA (Aug. 6, 2012), http://www.bna.com/flsa-lawsuits-hit-n12884911026/ 14

Oliff, Phil, Chris Mai & Vincent Palacios, *States Continue to Feel Recession's Impact* 2 (Jun. 27, 2012), *available at* http://www.cbpp.org/cms/index.cfm?fa=view&id=711 21

Smith Barney to Settle Brokers' Overtime Suit, L.A. Times (May 24, 2006), http://articles.latimes.com/2006/may/24/business/fi-wrap24.2 17

The Dunlop Commission on the Future of Worker-Management Relations–Final Report 49 (Dec. 1, 1994), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace.....18, 19

Zamansky, Jake, *Investors Face Potential Municipal Bond Armageddon*, Forbes, (Apr. 25, 2013, 11:03 AM), http://www.forbes.com/sites/jakezamansky/2013/04/25/investors-face-potential-municipal-bond-armageddon/..... 21

BRIEF FOR *AMICI CURIAE* THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE NATIONAL LEAGUE OF CITIES, AND THE NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION IN SUPPORT OF PETITIONER

The International Municipal Lawyers Association, the National League of Cities, and the National Public Employer Labor Relations Association respectfully submit this *amici curiae* brief in support of the petition for a writ of certiorari in this case.[1] *Amici* seek to offer additional reasons that this Court should grant certiorari to determine whether time spent in security screenings is compensable under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act.

---

[1] Pursuant to this Court's Rule 37.2(a), the written consent of the Respondents to the filing of this brief is being lodged herewith. Petitioner has filed a blanket consent to the filing of *amicus* briefs. *Amici* mistakenly notified Respondents of their intention to file this brief eight days before the due date, rather than ten days. However, Respondents had more than ten days' notice of another *amicus* brief and consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

INTEREST OF *AMICI CURIAE*

The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization based in the Washington D.C. area that has been an advocate and valuable legal resource for local government attorneys since 1935. IMLA offers more than 1,400 members across the United States and Canada continuing legal education courses, research services, membership in substantive law sections, litigation assistance in the form of *amicus* briefs, a bi-monthly magazine (the Municipal Lawyer), model ordinance services, an electronic bi-weekly newsletter, and substantive CLE accredited teleconferences.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The National Public Employer Labor Relations Association (NPELRA) is the premier national organization for public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with over 2300 members, that represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high quality, progressive labor relations advice that balances the needs of management and the public interest, to promote the interests of public sector management in the judicial and legislative areas, and to provide networking op-

portunities for members by establishing state and regional organizations throughout the country.

Amici curiae have a strong interest in apprising the Court of the significant adverse consequences facing the nation's state and local governments if the decision below is allowed to stand. As *amici* argue below, the Ninth Circuit's decision substantially departs from this Court's precedent, and it has far-reaching consequences for employers struggling to manage the effects of the Great Recession. Unless the Court intervenes, state and local governments, which collectively are the nation's largest employer, might be pushed to the brink by unanticipated and unbudgeted claims for compensation for preliminary or postliminary activities that are not an "integral" part of their employees' principal work.

SUMMARY OF ARGUMENT

In a ruling unmoored from the text of the statute and this Court's precedent, the Ninth Circuit split with two other circuits by holding that time spent passing through security screenings is compensable under the Fair Labor Standards Act (FLSA), as amended by the Portal-to-Portal Act. Presented with facts materially indistinguishable from those previously confronted by the Second and Eleventh Circuits, the court chose not to follow those reasoned decisions because the employer in this case "requires the security screenings, which must be done at work," and "the screenings are intended to prevent employee theft" and are therefore done "for the employer's benefit." Pet. App. 11–12.

The Ninth Circuit's opinion reflects a substantial departure from this Court's precedent dictating when a preliminary or postliminary activity is compensable under the FLSA as an "integral and indispensa-

ble" part of an employee's principal activities and warrants immediate review. The Ninth Circuit focused exclusively on whether the security screening was "indispensable"—wholly eliminating the "integral" component from what the circuits have recognized is a "bipartite" test under this Court's precedent. By not requiring that the security screening be "integral," the Ninth Circuit avoided the recognition of the Second Circuit in *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 593 (2d Cir. 2007), that security screenings, even if "indispensable," are plainly not "integral."

The Ninth Circuit's decision invites, and indeed encourages, future litigation seeking compensation for mundane and inconsequential tasks traditionally understood to be non-compensable. This flies in the face of the expressed Congressional intent behind the Portal-to-Portal Act to limit rather than expand employer liability. It also dramatically increases the financial burden on employers. The costs of this decision are particularly high for *amici*'s members and partners—the state and local governments that collectively have more employees than any other employer. Yet state and local governments are also uniquely vulnerable to the high costs of unanticipated FLSA claims, particularly at a time thousands of those governments face budget crises. Accordingly, *amici* respectfully request that this Court grant the petition for certiorari.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION WILL SIGNIFICANTLY HARM STATE AND LOCAL GOVERNMENTS.

Congress enacted the Portal-to-Portal Act in 1947 specifically to cut back on the expansive defini-

tion of "work" adopted by this Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691–92 (1946). The Portal-to-Portal Act excludes from FLSA coverage, as relevant here, "activities which are preliminary to or postliminary to [the employee's] principal activity or activities." 29 U.S.C. § 254(a)(2). Nine years later, this Court held in *Steiner v. Mitchell* that "activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an *integral and indispensable part of the principal activities* for which covered workmen are employed " 350 U.S. 247, 256 (1956) (emphasis added).

Since *Steiner*, lower courts have at times struggled to apply the "integral and indispensable" test consistently. But the courts have generally agreed that the test is a "bipartite" one—comprising an inquiry into whether the disputed activity is "indispensable" or "necessary," and a separate inquiry into whether it is "integral," or "so closely related to other duties performed as to be an integral part thereof." *E.g., Bamonte v. City of Mesa*, 598 F.3d 1217, 1225 (9th Cir. 2010); *Steiner*, 350 U.S. at 252; *see also IBP, Inc. v. Alvarez*, 546 U.S. 21, 40 (2005) ("the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are 'integral and indispensable' to a 'principal activity' under *Steiner*."); *Gorman*, 488 F.3d at 592 ("'Indispensable' is not synonymous with 'integral.'").

The Ninth Circuit's decision here effectively eliminates a critical component of that bipartite test where security screenings are at issue, creating a

palpable and problematic split in the circuits. The court asked only whether the security screening was "necessary" and done for the "benefit of the employer"—not whether it was "integral" to the employees' primary activity. Pet. App. 12. But to be compensable under the Portal-to-Portal Act, an activity must not only be *indispensable*, it must also be *integral*—*i.e.*, "so closely related" to the employee's principal activity "as to be an integral part thereof." *Steiner*, 350 U.S. at 252. Even where "activities might be necessary in some sense," they do not require compensation if "they are not 'so closely related to the work which [the plaintiffs] and the other employees perform" as to be "considered an integral and indispensable part of their principal activities." *Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274, 1289 (10th Cir. 2006) (citation and internal quotations omitted).

In concluding that security screenings were *not* compensable, the Second and Eleventh Circuits both determined that they were not an integral part of the employees' work. The Ninth Circuit's approach eliminates this separate inquiry, creating an incomplete and watered-down framework that will likely encourage an inordinate amount of FLSA litigation aimed at procuring payments for mundane and inconsequential activities, far beyond the specific context of security screenings. The decision leaves state and local governments at substantial risk of increasing financial liabilities at a time when they can least afford them.

A. The Ninth Circuit's Decision Splits from the Second and Eleventh Circuits on Materially Indistinguishable Facts.

The plaintiffs in this case are former Integrity employees who "worked as hourly employees at

warehouses filling orders placed by Amazon.com customers." Pet. App. 4. At the end of each shift, the plaintiffs "waited up to 25 minutes to be searched; removed their wallets, keys, and belts; and passed through medical detectors" as required by Integrity to minimize "'shrinkage,' or loss of product from warehouse theft." *Id.* The Ninth Circuit found that the time spent passing through the security screenings was compensable under the FLSA as an "integral and indispensable" part of the plaintiffs' principal activities. The court considered conclusive the fact that "the security clearances are necessary to employees' primary work as warehouse employees and done for Integrity's benefit." Pet. App. 11–12.

Other circuits have resolved the precise question presented here in a manner diametrically opposed to the Ninth Circuit's holding. In *Gorman*, workers at a nuclear power station sought compensation under the FLSA for the time they were required to spend each day "passing through multiple layers of security and suiting up" before they could "perform the tasks for which they were hired." *Gorman*, 488 F.3d at 591. The Second Circuit explained that the terms "integral" and "indispensable" are "not synonymous." *Id.* at 592. Instead, "'[i]ndispensable' means 'necessary,'" while "'[i]ntegral' means, *inter alia*, 'essential to completeness'; 'organically joined or linked'; 'composed of constituent parts making a whole.'" *Id.* Following this Court's reasoning in *Steiner* and *IBP*, the Second Circuit held that the time the employees spent passing through security "while arguably indispensable," or "necessary," was "not integral to their principal activities." *Id.* at 593. Such activities are "modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act, in particular, travel time." *Id.*

The Eleventh Circuit reached the same conclusion in *Bonilla v. Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 (11th Cir. 2007). Construction workers employed to complete a project at Miami International Airport "were required to pass through a single security checkpoint to the tarmac and then ride authorized buses or vans to their particular work site." *Id.* at 1341. They sought compensation under the FLSA for the "time spent riding the buses" and "going through airport security." *Id.* at 1342. The workers "place[d] great weight on the necessity of going through the screening in order to do their jobs." *Id.* at 1344. The Eleventh Circuit, like the Second Circuit in *Gorman*, emphasized that a claim of "necessity" does not suffice to demonstrate that an activity is integral and indispensable. As the court correctly pointed out, "[i]f mere causal necessity was sufficient to constitute a compensable activity, all commuting would be compensable because it is a practical necessity for all workers to travel from their homes to their jobs." *Id.*

The Ninth Circuit, in direct contrast to the Second and Eleventh Circuits, concluded that security screening is compensable so long as it is (1) "necessary to the principal work performed"; and (2) "done for the benefit of the employer." Pet. App. 11 (citing *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902–03 (9th Cir. 2003), *aff'd on other grounds*, 546 U.S. 21 (2005)). The court found those two elements satisfied here because "Integrity requires the security screenings, which must be conducted at work," and "the screenings are intended to prevent employee theft" and therefore "done for Integrity's benefit." Pet. App. 11–12. In other words, if an employer requires security screenings to manage shrinkage, as is the case here, the time spent passing through that security is com-

pensable. But if a third party requires it, for example, to ensure safety and security then the time is not compensable.

This distinction is unsupported by the text of the Portal-to-Portal Act and, taken to its logical conclusion, would produce an absurd result. Two employees doing identical work for the same employer would be compensated differently for time spent passing through security depending on whether the screenings are required by the employer or required by some other entity (like the federal government). The question of compensability "must be determined 'in accordance with common sense and the general concept of work or employment.'" *Hultgren v. Cnty. of Lancaster, Neb.*, 913 F.2d 498, 504 (8th Cir. 1990). Expansively interpreting "integral and indispensable" to make some security screenings compensable and others non-compensable is difficult to reconcile with traditional understandings of "work and employment"—and it defies common sense.

Moreover, neither *Gorman* nor *Bonilla* turned on the fact that the screening at issue was required by a third party and not "for the benefit of the employer." Nor does either support the Ninth Circuit's conclusion that *Gorman* and *Bonilla* are distinguishable because, "in those cases, everyone who entered the workplace had to pass through a security clearance." Pet. App. 12. For good reason; an activity is either so much a part of, and necessary to, a principal activity to be "integral and indispensable," or it is not. The purpose of the activity or the identity of the entity requiring it does not make it more necessary or more integrated into the principal activity. *See Gorman*, 488 F.3d at 593 (recognizing that the scope of the Portal-to-Portal Act "does not depend on the *purpose*

of any preliminaries" or postliminaries) (emphasis added).

Gorman specifically identified the basis for its holding—the lack of any showing that the screening was "integral" because it was "'essential to completeness'; 'organically joined or linked'; [or] 'composed of constituent parts making a whole'" with the primary activity. The Ninth Circuit made no attempt to find that the security screening here was "integral" in that sense. Accordingly, the decision of the court below cannot be reconciled with either *Gorman* or *Bonilla*.

B. The Ninth Circuit's Disregard of Whether the Activity at Issue Was "Integral" Is Irreconcilable with This Court's Precedent.

The Ninth Circuit's reasoning in finding the time spent in security screening here compensable not only splits with the decisions of the Second and Eleventh Circuits, but also departs substantially from this Court's instructions regarding the "integral and indispensable" analysis. In so doing, it presents a significant risk of outsized liability in future cases, including to state and local entities represented by *amici*. The Ninth Circuit probed whether the security screenings were "indispensable," but effectively ignored the question of whether the screenings were an integral part of the plaintiffs' principal activities. This interpretation of the Portal-to-Portal Act and this Court's decision in *Steiner* is so expansive that it eviscerates the general rule that preliminary and postliminary activities are not compensable.

This Court first applied the "integral and indispensable" test in *Steiner*, holding that workers at a battery plant who were required to change into pro-

tective gear before each shift and shower and change out of the gear at the end of the shift were entitled to compensation because those activities were an integral and indispensable part of their employment at the plant. 350 U.S. at 256. Those activities (1) were made necessary by the nature of the work performed at the plant; (2) fulfilled mutual obligations between the workers and their employer; (3) directly benefited the employers; and (4) were "so closely related to other duties performed as to be an integral part thereof." *Id.* at 252.

The same factors controlled in *Mitchell v. King Packing Co.*, 350 U.S. 260 (1956). This Court held that knifemen employed to perform various butchering operations must be compensated for time spent sharpening their knives if such knives are required to "be 'razor sharp' for the proper performance of the work." *Mitchell*, 350 U.S. at 262–63. After all, "[a]t the time a man is hired for, or promoted to, a knife job, it is understood that he will be required to sharpen knives"; and the knifemen were "expected to perform that task as well as other tasks connected with the job." *Id.* at 262. On those facts, knife sharpening was held to be integral and indispensable to the knifemen's principal activities. *Id.* at 262–63.

This Court most recently applied the "integral and indispensable" test in *IBP v. Alvarez*, 546 U.S. 21 (2005). There, it was undisputed that donning and doffing of protective gear by meat processing plant workers were principal activities. *Id.* at 32. The questions presented, therefore, were whether "the time employees spend walking between the changing area and the production area is compensable," and "whether the time employees spend waiting to put on protective gear is compensable" under the

FLSA. *Id.* at 24. The Court held that "during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity and before the end of the employee's last principal activity" is compensable. *Id.* at 37. That included "time spent waiting to doff." *Id.* at 40. But it did not include "time spent waiting to don—time that elapses *before* the principal activity of donning integral and indispensable gear." *Id.* at 40 (emphasis original). The fact that those pre-donning activities were "necessary for employees to engage in their principal activities" did not compel a conclusion of compensability. *Id.* at 40–41. The pre-donning "waiting" was "two steps removed from the productive activity on the assembly line" and thus not "integral" to the plant workers' principal activities. *Id.* at 37, 42.

Steiner, *Mitchell*, and *IBP* together stand for the proposition that preliminary and postliminary activities are "integral and indispensable" only if they are required for the proper performance of the work, done for the benefit of the employer, *and* "so closely related to other duties performed as to be an integral part" of the employee's principal activity. *Steiner*, 350 U.S. at 252. This last inquiry is critical because "'indispensable' is not synonymous with 'integral.'" *Gorman*, 488 F.3d at 592. Indeed, this Court's conclusion that time spent waiting to don protective clothing was not compensable in *IBP* would be unsupportable if the employees needed only to show that the time was "necessary" and for the benefit of the employer. The Court treated the time spent waiting to don as necessary, and it was plainly for the employer's benefit, yet the Court declined to find it compensable because it was not "*always* essential if the worker is to do his job." *IBP*, 546 U.S. at 40–41 (emphasis original).

In contrast, in *Steiner*, the compensable activities were "so closely related to other duties performed as to be an integral part thereof." *Steiner*, 350 U.S. at 252. The Ninth Circuit's disregard of this requirement adopts an expansive reading of *Steiner* and the Portal-to-Portal Act that "flies in the face of expressed Congressional intent to limit rather than expand employer liability for wage payments." *Bamonte*, 598 F.3d at 1221 n.1. *Gorman*, on the other hand, properly reads both *Steiner* and the Portal-to-Portal Act "narrowly." *See Franklin v. Kellogg Co.*, 619 F.3d 604, 619 (6th Cir. 2010); *see also Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 365 (4th Cir. 2011).

In short, nothing in *Steiner*, *Mitchell*, or *IBP* supports the Ninth Circuit's expansive interpretation of "integral and indispensable" in the context of security screenings. *See Gorman*, 488 F.3d at 593. Nor is there any support for its broad reading in the text, purpose, or legislative history of the Portal-to-Portal Act. This Court should grant certiorari to resolve the clear circuit split on the question presented and reaffirm the importance of asking whether the preliminary or postliminary activity for which employees are seeking compensation is both "indispensable" *and* "integral" to the employees' principal activities.

C. The Ninth Circuit's Decision Invites a Flood of FLSA Litigation and Poses a Substantial Threat to Employers.

The Ninth Circuit's departure from the law adopted by other circuits has serious and immediate consequences. The number of FLSA claims filed each year in federal court has risen at an alarming rate over the past 10 years. Since many of these suits are filed as collective actions representing hun-

dreds or thousands of plaintiffs, each suit represents millions or hundreds of millions of dollars of potential liability and legal expenses for employers. Allowing the Ninth Circuit's decision to stand would induce a deluge of litigation over preliminary and postliminary activities that are not "so closely related to other duties performed as to be an integral part thereof." *Steiner*, 350 U.S. at 252.

Congress has long recognized the threat posed to employers by unchecked FLSA liability. Indeed, it enacted the Portal-to-Portal Act in 1947 in response to expansive judicial interpretations that were "creating wholly unexpected liabilities," which could bring about the "financial ruin of many employers." 29 U.S.C. § 251(a). Although the Portal-to-Portal Act was intended to curb employer liability, litigation has recently been trending in the exact opposite direction. Between 2010 and 2012, for example, the number of FLSA claims filed each year in federal court increased by almost 1,000.[2] From March 31, 2011 to March 31, 2012, a record-high 7,064 FLSA suits were filed in federal court.[3] That represents a 347% increase over a ten year period.[4] The Ninth

---

[2] *FLSA Cases in Federal Court*, Seyfarth Shaw LLP (2012), http://op.bna.com/dlrcases.nsf/id/kmgn-8wkkf7/$File/FLSAchart.pdf.

[3] Kevin P McGowan, *FLSA Lawsuits Hit Record High in 2012, Continuing Recent Trend of Sharp Growth*, Bloomberg BNA (Aug. 6, 2012), http://www.bna.com/flsa-lawsuits-hit-n12884911026/.

[4] Kevin LaCroix, *Wage and Hour Suit Filings at All-Time High*, LexisNexis, (July 30, 2012, 12:48 PM), http://www.lexisnexis.com/legalnewsroom/securities/b/securities/archive/2012/07/30/wage-and-hour-suit-filings-at-all-time-high.aspx.

Circuit's expansive interpretation of the "integral and indispensable" standard practically ensures that this alarming trend will continue unabated, if not intensify.

Before this case, federal courts uniformly and correctly held that time spent passing through security screening is not compensable. *See, e.g.*, *Gorman*, 488 F.3d at 593–94; *Bonilla*, 487 F.3d at 1345. As a result, lower courts routinely granted employers' dismissal or summary judgment motions, thereby minimizing the cost associated with FLSA security screening claims. *See, e.g.*, *Anderson v. Perdue Farms, Inc.*, 604 F Supp. 2d 1339, 1359 (M.D. Ala. 2009) ("The law is clear that Plaintiffs are not entitled to compensation for [time spent clearing security]."); *Sleiman v. DHL Express*, No. 09-0414, 2009 WL 1152187, at *4 (E.D. Pa. Apr. 27, 2009) ("To this Court's knowledge, every court which has addressed this issue has found that time spent participating in security screening is not compensable under the FLSA."); *Whalen v. United States*, 93 Fed. Cl. 579, 600–01 (Fed. Cl. 2010) (relying on *Gorman* and *Bonilla* to grant the government summary judgment on the plaintiffs' FLSA security screening claims); *Jones v. Best Buy Co., Inc.*, No. 0:12-cv-95, at *6–7 (D. Minn. Apr. 12, 2012) (holding that plaintiffs' claims for compensation for time spent clearing security failed as matter of law and granting defendant's motion to dismiss on that claim).

By expansively defining "integral and indispensable" to allow the plaintiffs to advance a claim that has been uniformly rejected in other circuits, the Ninth Circuit opened the door for even more FLSA litigation. In the past six months alone, at least ten FLSA collective actions seeking compensation for

time spent in security screenings have been filed in federal courts. *See, e.g.*, *Frlekin v. Apple, Inc.*, No. 3:13-cv-3451 (N.D. Cal. July 25, 2013); *Vance v. Amazon.com, Inc.*, No. 3:13-cv-765 (W.D. Ky. Aug. 1, 2013); *Kilker v. Apple, Inc.*, No. 3:13-cv-3775 (N.D. Cal. Aug. 14, 2013); *Allison v. Amazon.com, Inc.*, No. 2:13-cv-1612 (W.D. Wash. Sept. 6, 2013); *Suggars v. Amazon.com, Inc.*, No. 3:13-cv-906 (M.D. Tenn. Sept. 9, 2013); *Johnson v. Amazon.com, Inc.*, 1:13-cv-153 (W.D. Ky. Sept. 17, 2013); *Davis v. Amazon.com, Inc.*, No. 3:13-cv-1091 (M.D. Tenn. Oct. 4, 2013); *Kalin v. Apple, Inc.*, No. 3:13-cv-04727 (N.D. Cal. Oct. 10, 2013); *Gibson v. Amazon.com, Inc.*, No. 3:13-cv-1136 (M.D. Tenn. Oct. 11, 2013); *Rosenthal v. Amazon.com, Inc.*, No. 1:13-cv-1701 (D. Del. Oct. 15, 2013).

Additionally, at least one court has reversed course on its prior dismissal of a collective action seeking compensation for security screening time after the Ninth Circuit issued its opinion. *See Ceja-Corona v. CVS Pharmacy, Inc.*, No. 1:12-cv-1868, 2013 WL 3282974 (E.D. Cal. June 27, 2013). In *Ceja-Corona*, the court originally relied on *Gorman* and *Bonilla* to dismiss the plaintiffs' complaint with prejudice. *Ceja-Corona v. CVS Pharmacy, Inc.*, No. 1:12-cv-1868, 2013 WL 796649, at *8–9 (E.D. Cal. Mar. 4, 2013). But after the Ninth Circuit's decision, the court reversed itself and granted the plaintiffs leave to amend. *Ceja-Corona*, 2013 WL 3282974, at *4-5. *Ceja-Corona* sounds the alarm of what is likely to come.

The harm done by the Ninth Circuit's ruling is unlikely to be limited to the specific context of security screening. To the contrary, the courts in both *Gorman* and *Bonilla* cautioned that broadly inter-

preting "integral and indispensable" to encompass security screenings would have important implications for the compensability of mere "travel time" and "commuting." *Gorman*, 488 F.3d at 593; *Bonilla*, 487 F.3d at 1344.

The increase in FLSA litigation spurred by the Ninth Circuit's opinion will almost surely be accompanied by exorbitant damages awards. In 2009, the average compensatory award, excluding attorneys' fees, in all federal court employment cases was more than $490,000, a 45% increase since 2000. Elizabeth Erickson & Ira Mirsky, *Employers Responsibilities When Making Settlements in Employment-Related Claims*, Bloomberg Law Reports (2009), http://www.mwe.com/info/pubs/Bloomberg_Employers.pdf. Today, "[i]n any employment case filed in federal court, there is a 16% chance the award (excluding attorney fees) will exceed $1 million, and a 67% chance that the award will exceed $100,000." *Id.* The cost of settling can be equally devastating, and it has "tripled during the past five years, to an average of more than $300,000." *Id.* Many cases result in far more liability, such as recent settlements of $65 million to $640 million to settle collective actions under the FLSA or comparable state laws.[5]

---

[5] *I.B.M. Agrees to Pay $65 Million to Settle Dispute on Overtime*, N.Y. Times (Nov. 23, 2006), http://www.nytimes.com/2006/11/23/technology/23IBM.html; *Smith Barney to Settle Brokers' Overtime Suit*, L.A. Times (May 24, 2006), http://articles.latimes.com/2006/may/24/business/fi-wrap24.2; Margaret Cronin Fisk, *Wal-Mart Will Pay Up to $640 Million in Settlement*, Bloomberg (Dec. 23, 2008, 18:57 EST), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aX6vHzFR2avg; *Craig v. Rite Aid Corp.*, 13 N.W. Pers. Injury Litig. Rep. 53, 2013 WL 1397751 (M.D. Pa. Jan. 7, 2013) (re-

Similar results have occurred in cases litigated to final judgment. *See, e.g., Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1240, 1285 (11th Cir. 2008) (affirming a final judgment of more than $35 million against Family Dollar Stores in a FLSA collective action brought by 1,424 store managers seeking overtime compensation); *Alvarez v. IBP, Inc.*, No. CT-98-5005-RHW, 2005 WL 3941313, at *1 (E.D. Wash. Dec. 20, 2005) (awarding plaintiffs over $9 million in damages, costs, and attorneys' fees).

Settlement figures and jury awards only capture a fraction of the expense associated with defending against employment suits. Even for suits that are ultimately dismissed, employers must devote significant amounts of time and money to adequately defend themselves against non-meritorious and arguably frivolous claims. A report prepared by the Dunlop Commission, at the behest of the Secretary of Labor and the Secretary of Commerce, found that "[f]or every dollar paid to employees through litigation, at least another dollar is paid to attorneys involved in handling both meritorious and non-meritorious claims." *The Dunlop Commission on the Future of Worker-Management Relations–Final Report* 49 (Dec. 1, 1994).[6] And that does not include the costs borne by employers to ensure that they are FLSA compliant. As the Dunlop Commission explained, "employ-

---

[Footnote continued from previous page]

porting a $20.9 million settlement of a FLSA collective action and state law class action).

[6] The Report is available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace.

ers often dedicate significant sums to designing defensive personnel practices to minimize their litigation exposure." *Id.*

By omitting the "integral" prong of the bipartite "indispensable and integral" test, the Ninth Circuit's decision virtually guarantees that employers will face a new wave of security-screening FLSA claims—as well as similar claims emboldened by the Ninth Circuit's expansive interpretation of the Act. Such an expansive interpretation unnecessarily burdens employers and is directly contrary to the purpose of the Portal-to-Portal Act.

D. The Ninth Circuit's Decision Could Decimate State and Local Government Coffers.

While the Ninth Circuit's liberal interpretation of "integral and indispensable" is troubling to all employers, it is particularly disconcerting for state and local governments, which collectively operate as the nation's largest employer.

As of March 2011, state and local governments employed roughly 19.3 million people.[7] By comparison, the nation's largest private employer employed 2.2 million people globally in 2013.[8] As the nation's largest employer, state and local governments have a significant interest in the outcome of any case that

---

[7] Deirdre Baker, *Annual Survey of Public Employment & Payroll Summary Report*: 2011 2–3 (Aug. 22, 2013), *available at* http://www2.census.gov/govs/apes/2011_summary_report.pdf.

[8] Alexander E.M. Hess, *The 10 Largest Employers in America*, USA Today (Aug. 22, 2013, 7:48 AM), http://www.usatoday.com/story/money/business/2013/08/22/ten-largest-employers/2680249/.

has the potential to greatly expand employer liability. These entities already spend approximately $70.5 billion each month on payroll.[9] If the Ninth Circuit's opinion increases payroll expenses by only 0.25%, it will increase state and local governments' payroll expenses by an additional $176,250,000 each month, or over $2.1 billion each year.[10] These figures do not account for the additional expenses associated with litigating these cases, the cost of ensuring FLSA compliance, or the fact that any additional compensation would most likely be calculated at overtime rates.

State and local governments simply cannot afford this unanticipated and unbudgeted liability. Many are already in dire financial straits. In June of 2012, thirty-one states had projected budget gaps to-

---

[9] Baker, *supra* note 7, at 2–3.

[10] The Ninth Circuit's opinion would increase payroll by 0.25% if state and local governments were required to compensate employees amounting to 10% of payroll expenses for one additional hour per week based on a 40 hour work week: (1 ÷ 40) × 0.1 = 0.0025 or 0.25%. Respondent's attorney estimates that nationally hundreds of thousands of people employed as warehouse workers spend 20 to 30 minutes every day clearing employer mandated security screening. *9th Circuit Court of Appeals Says Amazon's Warehouse Workers Must Be Paid for Security Check Point Time*, Business Wire, (Apr. 12, 2013 6:57 PM), http://www.businesswire.com/news/home/20130412005934/en/9th-Circuit-Court-Appeals-Amazon%E2%80%99s-Warehouse-Workers. This amounts to approximately two additional compensable hours for every five days worked. Therefore, even if security screening conducted by state and local governments is twice as fast as the security screening at issue in this case, it would still lead to one additional hour of compensable time for every 5 days worked by affected employees.

taling $55 billion for fiscal year 2013,[11] and four of the five largest municipal bankruptcies in history were filed in the past three years, with Detroit, Michigan ($18 billion) filing in 2013, Stockton, California ($1 billion) and San Bernardino County, California ($500 million) filing in 2012, and Jefferson County, Alabama ($4 billion) filing in 2011.[12] As of April 2013, municipal bond credit rating downgrades outnumbered credit rating upgrades for sixteen consecutive quarters, the longest period this has occurred since Moody's Investor Services began collecting data.[13] These cases reflect merely a snapshot of the widespread financial distress facing state and local governments across the nation.

Congressional amendments to the FLSA demonstrate Congress's intent that the goals of the FLSA be balanced against "the particular needs and circumstances of the states and their political subdivisions." S. Rep. No. 99-159, at 7 (1985). After this Court held that the FLSA applies to state and local governments in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), many government leaders expressed concern that they would

---

11 Phil Oliff, Chris Mai & Vincent Palacios, *States Continue to Feel Recession's Impact* 2 (Jun. 27, 2012), *available at* http://www.cbpp.org/cms/index.cfm?fa=view&id=711.

12 *Biggest Municipal Bankruptcies in U.S. History*, Forbes, http://www.forbes.com/pictures/ejii45efkm/the-5-biggest-municipal-bankruptcies-in-u-s-history/ (last visited Oct. 30, 2013).

13 Jake Zamansky, *Investors Face Potential Municipal Bond Armageddon*, Forbes, (Apr. 25, 2013, 11:03 AM), http://www.forbes.com/sites/jakezamansky/2013/04/25/investors-face-potential-municipal-bond-armageddon/.

be unable to cope with the substantial unanticipated financial responsibilities. S. Rep. No. 99-159, at 7–8 (1985). Responding to these concerns, Congress passed the Fair Labor Standards Amendments of 1985, which delayed the FLSA's application to state and local governments and expressed a clear intention that state and local government interests be accounted for when enforcing the FLSA. Pub. L. No. 99–150, 99 Stat. 787 (1985).

Congress's concerns for state and local government are also manifest in FLSA provisions creating different maximum hour rules for public fire protection or law enforcement employees, 29 U.S.C. § 207(k), and allowing public employers to provide compensatory time off in lieu of overtime compensation. 29 U.S.C. § 207(o). These exemptions all demonstrate an understanding that "local governments are in many cases not in a position to 'pass along' additional financial requirements to the taxpayer." 131 Cong. Rec. 4191-01 (1985) (statement of Rep. John P. Hammerschmidt conveying local government officials' concern regarding the impact of *Garcia*).

Piling additional liabilities on governments that are still struggling to overcome the effects of the Great Recession will undoubtedly push some of our nation's state and local governments even closer to insolvency. Given the high stakes, it is imperative that this Court take immediate action to resolve the current circuit split and correct the Ninth Circuit's expansive view of "integral and indispensable" activities.

II. THE COURT SHOULD NOT DELAY RULING ON THESE IMPORTANT MATTERS.

Security screenings have become ubiquitous in post-9/11 America, and practically mandatory for entry into (and frequently egress from) sensitive government buildings like State Capitols, government offices, and courthouses. The overwhelming majority of public-sector employees who work in these sensitive buildings must pass through security screenings each and every day—for obvious reasons such as ensuring the safety and security of important government assets and deterring workplace violence. The Ninth Circuit's decision requires some employees to be compensated for this time. The Second and Eleventh Circuits have reached the opposite conclusion. As the petitioner points out, "[b]ecause of the ease with which nationwide FLSA class actions can be brought, the Ninth Circuit's decision threatens to become the *de facto* national standard." Cert. Pet. 5.

As explained above, this unanticipated surge in litigable FLSA claims will have an immediate and devastating impact on employers—particularly state and local governments. This Court should grant the petition now to correct the Ninth Circuit's errors before they cause further harm to the nation's employers.

CONCLUSION

For the foregoing reasons, and those in the petition, the Court should issue a writ of certiorari and reverse the judgment below.

Respectfully submitted.

JAMES C. HO
Counsel of Record
ASHLEY E. JOHNSON
ANDREW P LEGRAND
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Dallas, TX 75201
(214) 698-3100
jho@gibsondunn.com

Counsel for Amici Curiae

November 7, 2013

AMICUS CURIAE BRIEF

No. 13-433

In the Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC., PETITIONER

v.

JESSE BUSK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE RETAIL LITIGATION CENTER, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, AND NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

RONALD E. MEISBURG
Counsel of Record
JAMES F. SEGROVES
PROSKAUER ROSE LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004
(202) 416-6800
rmeisburg@proskauer.com

KENNETH D. SULZER
LAURA REATHAFORD
PROSKAUER ROSE LLP
2049 Century Park East
Los Angeles, CA 90067
(310) 557-2900

[*Additional Counsel Listed on Inside Cover*]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

DEBORAH R. WHITE
RETAIL LITIGATION
CENTER, INC.
1700 N Moore Street
Arlington, VA 22209
(703) 600-2067

Counsel for Amicus Curiae
Retail Litigation Center, Inc.

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae
Chamber of Commerce of the United States of America

NANCY B. HAMMER
SOCIETY FOR HUMAN
RESOURCE MANAGEMENT
1800 Duke Street
Alexandria, VA 22314
(703) 535-6030

Counsel for Amicus Curiae
Society for Human Resource Management

LINDA E. KELLY
QUENTIN RIEGEL
PATRICK N. FORREST
NATIONAL ASSOCIATION
OF MANUFACTURERS
733 10th Street, NW
Washington, DC 20001
(202) 637-3000

Counsel for Amicus Curiae
National Association of Manufacturers

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

STATEMENT 4

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. THE NINTH CIRCUIT'S DECISION CREATES SIGNIFICANT LEGAL UNCERTAINTY AND ENORMOUS POTENTIAL FINANCIAL LIABILITY FOR THOUSANDS OF EMPLOYERS THROUGHOUT THE NATION 8

II. THE NINTH CIRCUIT'S DECISION HAS IMMEDIATE REAL-WORLD IMPLICATIONS 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases: Page

Anderson v. Purdue Farms, Inc.,
604 F. Supp. 2d 1339 (M.D. Ala. 2009) 8

Bonilla v. Baker Concrete Constr., Inc.,
487 F.3d 1340 (11th Cir.),
cert. denied, 552 U.S. 1077 (2007) 6, 8

Ceja-Corona v. CVS Pharm., Inc.,
No. 1:12-cv-01868, 2013 WL 796649
(E.D. Cal. Mar. 4, 2013) 8

Genesis HealthCare Corp. v. Symczyk,
133 S. Ct. 1523 (2013) 10

Gorman v. Consol. Edison Corp.,
488 F.3d 586 (2d Cir. 2007),
cert. denied, 553 U.S. 1093 (2008) 6, 8

IBP, Inc. v. Alvarez,
546 U.S. 21 (2005) 11

Sleiman v. DHL Express,
No. 5:09-cv-00414, 2009 WL 1152187
(E.D. Pa. Apr. 27, 2009) 8

Steiner v. Mitchell,
350 U.S. 247 (1956) 5, 7, 11

U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Allenwood, Pa.,
65 FLRA 996 (2011) 9

Whalen v. United States,
93 Fed. Cl. 579 (2010) 8

Statutes: Page

Fair Labor Standards Act,
29 U.S.C. §§ 201-219 ..... *passim*

§ 216(b) 9, 10

Portal-to-Portal Act of 1947,
29 U.S.C. §§ 251-262 ..... 4, 6, 8

§ 254(a) 4

Regulations:

29 C.F.R. § 790.7(g) 8

29 C.F.R. § 790.8(c) 8

Other Authorities:

1st Am. Compl., *Busk v. Integrity Staffing Solutions, Inc.*, No. 2:10-cv-01854 (D. Nev. Dec. 15, 2010) 9

Admin. Office of the U.S. Courts, *Federal Judicial Caseload Statistics* (2002) 3

Admin. Office of the U.S. Courts, *Federal Judicial Caseload Statistics* (2012) 4

Benjamin James, *FLSA Actions Can Coexist With State Class Claims: 9th Circ.*, Law360 (Apr. 12, 2013) 13

Compl., *Cortez v. Ross Dress for Less, Inc.*, No. 5:13-cv-01298 (C.D. Cal. July 24, 2013) 11

Compl., *Kalin v. Apple, Inc.*, No. 3:13-cv-04727 (N.D. Cal. Oct. 10, 2013) 10

Compl., *Roberts v. TJX Cos.*, No. 3:13-cv-04731 (N.D. Cal. Oct. 10, 2013) 10

Other Authorities—Continued: Page

Spencer Soper, *The High Cost of Theft Prevention?*, Morning Call (Allentown, Pa.), Apr. 29, 2013, at A1 9

The Fair Labor Standards Act: Is It Meeting the Needs of the Twenty-First Century Workplace?, Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce, 112th Cong. (2011) 3

INTEREST OF *AMICI CURIAE*

Amicus curiae Retail Litigation Center, Inc. (RLC) is a public policy organization whose members include many of the country's largest and most innovative retailers.* The member-entities whose interests are represented by RLC operate throughout the United States, employ millions of individuals, and provide quality goods and services to tens of millions of consumers. Among other things, RLC provides courts with retail industry perspectives on important legal issues and highlights the industry-wide consequences of significant cases.

Amicus curiae the Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in

---

* No counsel for a party authored this brief in whole or in part, and no person other than the *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner has filed a blanket consent to the filing of *amicus* briefs. Respondents' written consent to the filing of this brief has been filed with the Clerk. Counsel of record for petitioner and respondents received notice of the *amici*'s intent to file this brief at least 10 days before the due date.

cases that raise issues of concern to the nation's business community.

Amicus curiae Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. SHRM represents over 250,000 human resource professionals who make up its membership. The purposes of SHRM, as set forth in its bylaws, are to promote the use of sound and ethical human resource management practices in the profession, and to (a) be a recognized world leader in human resource management; (b) provide high-quality, dynamic, and responsive programs and service to its customers with interests in human resource management; (c) be the voice of the profession on human resource management issues; (d) facilitate the development and guide the direction of the human resource profession; and (e) establish, monitor, and update standards for the profession. Founded in 1948, SHRM currently has more than 575 affiliated chapters within the United States and members in more than 140 countries.

Amicus curiae the National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the American economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers com-

pete in the global economy and create jobs across the United States.

Collectively, the foregoing *amici* represent a wide cross-section of the employer and human resource community throughout the United States. The *amici* therefore have a significant interest in promoting certainty in the law of the workplace. The vast majority of American employers dedicate considerable time, energy, and resources to achieve compliance with the myriad statutes governing the workplace, while at the same time maintaining and creating much-needed jobs. Legal confusion only complicates those efforts by fostering unnecessary and costly litigation.

Legal uncertainty is especially harmful under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219, which establishes nationwide minimum-wage, maximum-hour, and overtime requirements governing more than 130 million workers in every conceivable industry. *See The Fair Labor Standards Act: Is It Meeting the Needs of the Twenty-First Century Workplace?, Hearing Before the Subcomm. on Workforce Protections of the H. Comm. on Educ. & the Workforce*, 112th Cong. 2 (2011). In recent years, the employer community has been inundated by an ever-growing tidal wave of FLSA litigation. For example, a total of 2,035 FLSA actions were commenced in district courts throughout the United States during the 12-month period ending March 31, 2002. Admin. Office of the U.S. Courts, *Federal Judicial Caseload Statistics* 46 (2002). For the 12-month period ending March 31, 2012, that number had grown to 7,064—a nearly 300 percent increase. Ad-

min. Office of the U.S. Courts, *Federal Judicial Caseload Statistics* 49 (2012).

Accordingly, the *amici* have long promoted efforts to remove legal uncertainty under the FLSA so that their respective members can do what most American businesses want to do: comply with the law and avoid costly litigation.

STATEMENT

1. Responding to what it believed were overly expansive interpretations of the FLSA, Congress narrowed the statute's scope by enacting the Portal-to-Portal Act of 1947 (Portal-to-Portal Act), 29 U.S.C. §§ 251-262. In relevant part, the Portal-to-Portal Act provides that

> no employer shall be subject to any liability or punishment under the [FLSA] on account of the failure of such employer to pay an employee wages on account of any of the following activities of such employee . —
>
> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) *activities which are preliminary to or postliminary to said principal activity or activities*,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

§ 254(a) (emphasis added).

The Portal-to-Portal Act does not define what constitutes "principal activity or activities," nor does

it define what it means for an activity to be "preliminary" or "postliminary." Over half a century ago, however, this Court held that "principal activity or activities" includes all preliminary and postliminary activities that are themselves an "integral and indispensable part" of the principal activities for which the employee is employed. *Steiner v. Mitchell*, 350 U.S. 247, 252-53 (1956).

2. Respondents Jesse Busk and Laurie Castro filed a putative collective action alleging that they and hundreds of other former and current employees of petitioner Integrity Staffing Solutions, Inc. (Integrity) are entitled to compensation for time spent undergoing security screening after the conclusion of their work shifts. The United States District Court for the District of Nevada dismissed that claim with prejudice. Pet. App. 28. Citing regulations promulgated by the Department of Labor over 60 years ago, the district court concluded that the security screening was a postliminary activity for which no compensation was required. *Id.* at 27-28. In doing so, the district court specifically rejected respondents' contention that undergoing security screening was itself a principal activity under *Steiner*'s "integral and indispensable" test. *Id.* Respondents "could perform their warehouse jobs without such daily security screenings," the district court explained. *Id.* at 28. Therefore, undergoing security screening was not an integral and indispensable part of respondents' "principal activities as warehouse employees fulfilling online purchase orders." *Id.* at 27.

3. The United States Court of Appeals for the Ninth Circuit reversed. Pet. App. 12. In a published opinion, the court of appeals found that *Steiner*'s "in-

tegral and indispensable" test had been satisfied, stating:

> Here, [respondents] have alleged that Integrity requires the security screenings, which must be conducted at work. They also allege that the screenings are intended to prevent employee theft—a plausible allegation since the employees apparently pass through the clearances only on their way out of work, not when they enter. As alleged, the security clearances are necessary to employees' primary work as warehouse employees and done for Integrity's benefit. Assuming, as we must, that these allegations are true, [respondents] have stated a plausible claim for relief.

Id. at 11-12. The Ninth Circuit did not address the Department of Labor's regulations upon which the district court relied.

SUMMARY OF ARGUMENT

As explained in detail by Integrity's petition for a writ of certiorari (Pet. 18-23), the Ninth Circuit's decision created a conflict with published opinions previously issued by the Second and Eleventh Circuits holding that security screening is a preliminary or postliminary activity exempted from the FLSA's compensation requirement by the Portal-to-Portal Act. *See Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 593-94 (2d Cir. 2007), *cert. denied*, 553 U.S. 1093 (2008) (No. 07-1019); *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1344-45 (11th Cir.), *cert. denied*, 552 U.S. 1077 (2007) (No. 07-554). That disagreement of appellate authority regarding the interpretation of the Portal-to-Portal Act alone warrants review by this Court to ensure the uniform application of the FLSA.

In addition, the Ninth Circuit's contrary decision presents a nationally significant legal question that begs for timely resolution by this Court. The Ninth Circuit's decision has created substantial legal uncertainty and enormous potential financial liability for thousands of employers throughout the United States. The ramifications of the Ninth Circuit's decision extend far beyond the geographic boundaries of the Ninth Circuit. The FLSA's collective-action device allows plaintiff's counsel to convert a lawsuit involving a single named employee with a relatively small claim into a lawsuit of nationwide scope involving tens of thousands of employees and tens of millions of dollars in claims. The FLSA also grants plaintiffs wide discretion in deciding where to file suit, which permits forum shopping. The Ninth Circuit's decision has already served as a magnet for plaintiff's lawyers seeking to take advantage of the Ninth Circuit's departure from long-established regulatory interpretations and preexisting precedent. That forum shopping has continued unabated since Integrity filed its petition in this Court.

The Ninth Circuit's decision also has immediate real-world implications. It would require thousands of employers to modify their time-keeping systems or eliminate security screening altogether. The latter option is untenable in today's world. The former option cannot be achieved overnight or without considerable cost. If such costs are to be imposed on the employer community nationwide through a judicial interpretation of the "integral and indispensable" test established by this Court in *Steiner*, it should only come from a decision of this Court, not the Ninth Circuit.

Accordingly, the Court should grant the petition in order to resolve the important question of federal law presented by this case.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CREATES SIGNIFICANT LEGAL UNCERTAINTY AND ENORMOUS POTENTIAL FINANCIAL LIABILITY FOR THOUSANDS OF EMPLOYERS THROUGHOUT THE NATION

For over half a century, the Department of Labor has advised employers that employee waiting time is generally noncompensable under the FLSA. *See* 29 C.F.R. §§ 790.7(g) & 790.8(c) (explaining, in guidance first promulgated shortly after the Portal-to-Portal Act's enactment, that checking in and out of work, waiting in line to do so, and waiting in line to receive pay checks are generally considered preliminary or postliminary activities). Moreover, prior to the Ninth Circuit's decision in this case, federal appellate and district courts had uniformly held that undergoing security screening is a preliminary or postliminary activity in a wide variety of settings. *See, e.g.*, *Gorman*, 488 F.3d at 593-94 (power plant); *Bonilla*, 487 F.3d at 1344-45 (airport); *Anderson v. Purdue Farms, Inc.*, 604 F Supp. 2d 1339, 1359 (M.D. Ala. 2009) (food-processing plant); *Ceja-Corona v. CVS Pharm., Inc.*, No. 1:12-cv-01868, 2013 WL 796649, at *9 (E.D. Cal. Mar. 4, 2013) (distribution center); *Sleiman v. DHL Express*, No. 5:09-cv-00414, 2009 WL 1152187, at *4-5 (E.D. Pa. Apr. 27, 2009) (mail-sorting center). Even cases involving federal workplaces had reached the same conclusion. *See Whalen v. United States*, 93 Fed. Cl. 579, 601 (2010) (air traffic control center); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed.*

Corr. Inst., Allenwood, Pa., 65 FLRA 996, 999-1000 (2011) (prison).

The Ninth Circuit's decision constitutes a radical departure from this long-standing regulatory interpretation and well-established precedent. That, in turn, creates the potential for significant and completely unanticipated financial liability for thousands of employers throughout the United States who either use security screening themselves or who have employees who must otherwise undergo such screening. In this case alone, respondents' counsel has asserted that the security-screening issue presents more than $100 million in potential liability. *See* Spencer Soper, *The High Cost of Theft Prevention?*, Morning Call (Allentown, Pa.), Apr. 29, 2013, at A1. To understand why that assertion cannot be disregarded as mere puffery, one must understand two things about FLSA litigation.

First, the FLSA's collective-action device allows plaintiff's counsel to leverage a lawsuit involving a single employee's claim into a lawsuit of nationwide scope involving tens of thousands of employees. *See* 29 U.S.C. § 216(b) (providing that employees may sue on behalf of themselves "and other employees similarly situated"). As evidenced by the amended complaint filed in this case, plaintiffs in putative collective actions under the FLSA often seek to represent all of an employer's current and former employees, regardless of their geographic location. *See* 1st Am. Compl. ¶ 21, *Busk v. Integrity Staffing Solutions, Inc.*, No. 2:10-cv-01854 (D. Nev. Dec. 15, 2010) (defining the "FLSA Class" as "[a]ll persons employed by [Integrity] as hourly warehouse employees within the United States at any time within three

years prior to" this action's filing); *see also Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523, 1527 (2013) (addressing putative collective action filed by former employee who sought to sue on behalf of thousands of similarly situated employees throughout the United States).

Second, the FLSA grants plaintiffs wide discretion in deciding where to file suit, which permits forum shopping. *See* 29 U.S.C. § 216(b) (providing FLSA suits may be filed in "any" federal court of "competent jurisdiction").

Therefore, the legal uncertainty and potential financial liability created by the Ninth Circuit's decision extends nationwide. Unsurprisingly, the Ninth Circuit's decision has already attracted litigants seeking to take advantage of the fact that most large and medium-sized employers—the principal targets of putative collective actions under the FLSA—do business somewhere within the expansive geographic boundaries of the Ninth Circuit. In addition to the cases cited by Integrity (Pet. 26-27), plaintiffs seeking to represent nationwide classes have recently filed several copycat security-screening cases within the Ninth Circuit. *See, e.g.*, Compl. ¶ 35, *Roberts v. TJX Cos.*, No. 3:13-cv-04731 (N.D. Cal. Oct. 10, 2013) (putative collective action filed by one former employee seeking to represent "[a]ll current and former [hourly] employees [of the defendants] who have worked in the United States at [the defendants'] retail store[s] at any time during the last three years"); Compl. ¶ 27, *Kalin v. Apple, Inc.*, No. 3:13-cv-04727 (N.D. Cal. Oct. 10, 2013) (putative collective action filed by one employee seeking to represent "[a]ll Hourly Employees who worked in an Apple, Inc. re-

tail store in the United States, who are or were employed within the three years preceding the filing of this action"); Compl. ¶ 14, *Cortez v. Ross Dress for Less, Inc.*, No. 5:13-cv-01298 (C.D. Cal. July 24, 2013) (putative collective action filed by two former employees seeking to represent all of the defendant's hourly employees "in and outside of California" who were employed by the defendant "at any time during the three years prior to the date of the filing of this Complaint").

Accordingly, the Ninth Circuit's decision has created nationwide legal uncertainty and enormous potential financial liability for thousands of employers. Regardless of whether this Court ultimately agrees or disagrees with the Ninth Circuit's decision on the merits, employers throughout the United States need a timely and final resolution of the security-screening question. This Court has acted to remove legal uncertainty under the FLSA in circumstances similar to this case. *See, e.g.*, *IBP, Inc. v. Alvarez*, 546 U.S. 21, 24 (2005) (explaining review was granted to address one-to-one circuit split on FLSA issue); *Steiner*, 350 U.S. at 248-49 (same). It should do so again here.

II. THE NINTH CIRCUIT'S DECISION HAS IMMEDIATE REAL-WORLD IMPLICATIONS

Given the widespread view in the employer community that security screening is a preliminary or postliminary activity excluded from the requirements of the FLSA (a legitimate view created by the long-standing regulatory guidance and preexisting precedent discussed above), compliance with the novel legal requirement established by the Ninth Circuit cannot be achieved overnight, nor can it be

achieved without employers having to incur the expense that accompanies dedicating the human resources and capital investment necessary to ensure compliance with that legal requirement. In industries where productivity is critical, margins are thin, and employee wages usually constitute an employer's largest expense, even slight increases in cost, when multiplied by thousands of employees, can make the difference between profit and loss (with devastating consequences for employers and employees alike).

Simply calculating those increased costs may prove challenging for many employers. The suggestion that all employers need do is move the security-screening process or their preexisting time-keeping systems fails to recognize the practical reality in many workplace settings. For example, employee theft in the retail industry—known in industry parlance as "shrinkage"—causes billions of dollars in losses each year, resulting in higher prices for consumers. To combat employee theft, many retailers use loss-prevention programs that include visually examining employee bags after the conclusion of employee work shifts. Advancing the time and location of security screening so that it occurs before employees depart from store areas containing merchandise susceptible to theft would significantly weaken the effectiveness of such screening.

As demonstrated by the workplaces at issue in this case and those at issue in the security-screening cases decided prior to the Ninth Circuit's decision, the effects of the Ninth Circuit's decision extend far beyond the retail industry. For example, most employers doing business in high-security environments (e.g., airports, skyscrapers, and government build-

ings) cannot move their time-keeping systems outside of tight security perimeters, which usually coincide with a building's or a facility's physical boundaries.

Therefore, unless this Court provides timely guidance, the Ninth Circuit's decision may require thousands of employers to take immediate and potentially costly proactive action in an effort to protect themselves against the type of copycat suits that are already being spawned by the Ninth Circuit's decision. As respondents' own counsel admitted to a national legal publication shortly after the Ninth Circuit's decision, the security-screening issue makes this a "huge case for the real world, and not just the legal world." Benjamin James, *FLSA Actions Can Coexist With State Class Claims: 9th Circ.*, Law360 (Apr. 12, 2013).

CONCLUSION

For the foregoing reasons and those contained in the petition, the petition should be granted.

Respectfully submitted.

RONALD E. MEISBURG
Counsel of Record
JAMES F. SEGROVES
PROSKAUER ROSE LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004
(202) 416-6800
rmeisburg@proskauer.com

KENNETH D. SULZER
LAURA REATHAFORD
PROSKAUER ROSE LLP
2049 Century Park East
Los Angeles, CA 90067
(310) 557-2900

[*Additional Counsel Listed on Following Page*]

DEBORAH R. WHITE
RETAIL LITIGATION
CENTER, INC.
1700 N Moore Street
Arlington, VA 22209
(703) 600-2067

Counsel for Amicus Curiae
Retail Litigation Center, Inc.

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae
Chamber of Commerce of the United States of America

NANCY B. HAMMER
SOCIETY FOR HUMAN
RESOURCE MANAGEMENT
1800 Duke Street
Alexandria, VA 22314
(703) 535-6030

Counsel for Amicus Curiae
Society for Human Resource Management

LINDA E. KELLY
QUENTIN RIEGEL
PATRICK N. FORREST
NATIONAL ASSOCIATION
OF MANUFACTURERS
733 10th Street, NW
Washington, DC 20001
(202) 637-3000

Counsel for Amicus Curiae
National Association of Manufacturers

NOVEMBER 2013

JOINT APPENDIX

No. 13-433

In the

Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC.,

Petitioner,

v.

JESSE BUSK and LAURIE CASTRO, on behalf of themselves and all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

MARK R. THIERMAN
THIERMAN LAW FIRM
7287 Lakeside Drive
Reno, NV 89511
(775) 284-1500
mark@thiermanlaw.com

Counsel of Record for Respondents

PAUL D. CLEMENT
BANCROFT PLLC
1919 M Street NW, Ste. 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel of Record for Petitioner

May 28, 2014

Petition for Writ of Certiorari Filed October 3, 2013
Petition for Writ of Certiorari Granted March 3, 2014

TABLE OF CONTENTS

Busk v. Integrity Staffing Solutions, No. 10-1854 (D. Nev.), Relevant Docket Entries.....JA 1

Busk v. Integrity Staffing Solutions, No. 11-16892 (9th Cir.), Relevant Docket Entries .....JA 11

First Amended Collective & Class Action Complaint (D. Nev. Dec. 15, 2010), DN 11.....JA 16

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following page in the appendix to the Petition for Certiorari:

Appendix A

Opinion of the United States Court of Appeals for the Ninth Circuit, *Busk v. Integrity Staffing Solutions, Inc.*, No. 11-16892 (Apr. 12, 2013) Pet.App.1

Appendix B

Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing and Petition for Rehearing En Banc, *Integrity Staffing Solutions, Inc.*, No. 11-16892 (June 3, 2013).....Pet.App.18

Appendix C

Order of the United States District Court for the District of Nevada Dismissing Plaintiffs' First Amended Complaint, *Busk v. Integrity Staffing Solutions, Inc.*, No. 10-cv-1854 (July 19, 2011).....Pet.App.19

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. 10-1854

BUSK, *et al.*,

v.

INTEGRITY STAFFING SOLUTIONS, *et al.*,

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
10/22/2010	1	COMPLAINT against Integrity Staffing Solutions (Filing fee $350 receipt number 0978–1773637), filed by Jesse Busk. Certificate of Interested Parties due by 11/1/2010. Proof of service due by 2/19/2011. (Attachments: #1 Civil Cover Sheet, #2 Summons) (Thierman, Mark) (Entered: 10/22/2010)
		* * *
10/22/2010	3	Summons Issued as to Integrity Staffing Solutions. (EDS). (Entered: 10/22/2010)
		* * *

Date Filed	#	Docket Text
11/24/2010	6	MOTION to Dismiss; filed by Defendant Integrity Staffing Solutions. Responses due by 12/11/2010. (Attachments: #1 Exhibit A) (Grandgenett, Roger) Modified text on 12/6/2010 (SRK). (Entered: 11/24/2010)
		* * *
12/9/2010	8	NON–OPPOSITION to 6 MOTION to Dismiss; filed by Plaintiff Jesse Busk. (Thierman, Mark) (Entered: 12/09/2010)
12/13/2010	9	REPLY to Response to 6 MOTION to Dismiss; filed by Defendant Integrity Staffing Solutions. (Walker, Cory) Modified text on 12/13/2010 (SRK). (Entered: 12/13/2010)
12/13/2010	10	Submission of PROPOSED ORDER on 9 Reply to Response to Motion to Dismiss; filed by Defendant Integrity Staffing Solutions. (Roskelley, Rick) Modified text on 12/13/2010 (SRK). (Entered: 12/13/2010)

Date Filed	#	Docket Text
12/15/2010	11	AMENDED COMPLAINT against Integrity Staffing Solutions, filed by Jesse Busk, Laurie Castro. Adds new parties. Proof of service due by 4/14/2011. (Attachments: #1 Notice of Filing of Consents to Joinder) (Thierman, Mark). (Entered: 12/15/2010)
12/20/2010	12	NOTICE by Plaintiffs Jesse Busk, Laurie Castro *of Filing of Consent to Joinder* (Thierman, Mark) (Entered: 12/20/2010)
		* * *
1/7/2011	15	ORDER Granting 6 Motion to Dismiss. ORDERED that the original Complaint is DISMISSED. Signed by Chief Judge Roger L. Hunt on 1/7/11. (Copies have been distributed pursuant to the NEF – MMM) (Entered: 01/10/2011)
1/18/2011	16	MOTION to Dismiss Amended Complaint by Defendant Integrity Staffing Solutions, Inc. Responses due by 2/4/2011. (Attachments: #1 Exhibit A) (Grandgenett, Roger) Modified text on 2/7/2011 (SRK). (Entered: 01/18/2011)

Date Filed	#	Docket Text
2/4/2011	17	RESPONSE to 16 MOTION to Dismiss Amended Complaint, filed by Plaintiffs Jesse Busk, Laurie Castro. Replies due by 2/14/2011. (Attachments: #1 Declaration of Mark R. Thierman in Support of Opposition to Motion to Dismiss Plaintiff's First Amended Complaint) (Thierman, Mark) Modified text on 2/16/2011 (SRK). (Entered: 02/04/2011)
2/14/2011	18	REPLY to Response to 16 MOTION to Dismiss Amended Complaint; filed by Defendant Integrity Staffing Solutions, Inc.. (Attachments: #1 Exhibit A, #2 Exhibit B) (Grandgenett, Roger) (Entered: 02/14/2011)
2/15/2011	19	ERRATA to 18 Reply to Response to 16 Motion to Dismiss Amended Complaint; filed by Defendant Integrity Staffing Solutions, Inc. (Walker, Cory) Docket entry relationship modified on 2/16/2011 (SRK). (Entered: 02/15/2011)

Date Filed	#	Docket Text
7/19/2011	20	ORDER Granting 16 Motion to Dismiss. Clerk is directed to close this case. Signed by Judge Roger L. Hunt on 7/19/11. (Copies have been distributed pursuant to the NEF – MMM) (Entered: 07/20/2011)
8/5/2011	21	NOTICE OF APPEAL as to 20 Order on Motion to Dismiss, by Plaintiffs Jesse Busk, Laurie Castro. Filing fee $ 455, receipt number 0978–2075464. E–mail notice (NEF) sent to the US Court of Appeals, Ninth Circuit. (Thierman, Mark) (Entered: 08/05/2011)
		* * *
8/8/2011	23	ORDER for Time Schedule as to 21 Notice of Appeal filed by Jesse Busk, Laurie Castro. USCA Case Number 11–16892. (JAG) (Entered: 08/08/2011)
4/12/2013	24	OPINION of USCA, Ninth Circuit, as to 21 Notice of Appeal filed by Jesse Busk, Laurie Castro. AFFIRMED in part, REVERSED in part, and REMANDED. (AC) (Entered: 04/12/2013)
		* * *

Date Filed	#	Docket Text
6/3/2013	28	ORDER of USCA, Ninth Circuit, as to 21 Notice of Appeal filed by Jesse Busk, Laurie Castro. The petition for rehearing and the petition for rehearing en banc are DENIED. (AC) (Entered: 06/03/2013)
6/12/2013	29	MANDATE of USCA, Ninth Circuit, as to 24 USCA Opinion and 21 Notice of Appeal filed by Jesse Busk and Laurie Castro. AFFIRMED in part, REVERSED in part, and REMANDED. (AC) (Entered: 06/17/2013)
6/18/2013	31	ORDER on Mandate as to 28 USCA Order and 29 USCA Mandate AFFIRMING in part, REVERSING in part, and REMANDING the Judgment of the District Court re 21 Notice of Appeal filed by Jesse Busk and Laurie Castro. This matter is referred to U.S. Magistrate Judge Nancy J. Koppe for the scheduling of a Status and/or Discovery Hearing. Signed by Judge Roger L. Hunt on 6/18/2013. (SLD) (Entered: 06/18/2013)
		* * *

Date Filed	#	Docket Text
6/26/2013	36	ANSWER to 11 Amended Complaint filed by Integrity Staffing Solutions, Inc. Certificate of Interested Parties due by 7/6/2013. Discovery Plan/Scheduling Order due by 8/10/2013. (Navarro, Peter) (Entered: 06/26/2013)
		* * *
8/19/2013	44	NOTICE from the U.S. Supreme Court that the application for an extension of time within which to file a petition for a Writ of Certiorari has been presented to Justice Kennedy, who on 8/12/2013 extended the time to 10/3/2013 as to Integrity Staffing Solutions, Inc. (AC) (Entered: 08/21/2013)
8/23/2013	45	MOTION to Stay by Defendant Integrity Staffing Solutions, Inc. Motion ripe 8/23/2013. (Attachments: #1 Exhibit A, #2 Exhibit B) (Roskelley, Rick) (Entered: 08/23/2013)
		* * *

Date Filed	#	Docket Text
8/28/2013	47	SECOND AMENDED COMPLAINT against Integrity Staffing Solutions, Inc., Amazon.com, Inc., filed by Jesse Busk, Laurie Castro, Sierra Williams, Brooke Bomboy, Monica Williams. Adds new parties. Proof of service due by 12/26/2013. (Thierman, Mark) (Entered: 08/28/2013)
8/30/2013	48	RESPONSE to 45 MOTION to Stay , filed by Plaintiffs Brooke Bomboy, Jesse Busk, Laurie Castro, Monica Williams, Sierra Williams. Replies due by 9/9/2013. (Thierman, Mark) (Entered: 08/30/2013)
9/4/2013	49	REPLY to Response to 45 MOTION to Stay filed by Defendant Integrity Staffing Solutions, Inc. (Navarro, Peter) (Entered: 09/04/2013)
9/5/2013	50	ORDER Granting 45 Motion to Stay. Signed by Magistrate Judge Nancy J. Koppe on 9/5/2013. (Copies have been distributed pursuant to the NEF – SLR) (Entered: 09/05/2013)

* * *

Date Filed	#	Docket Text
10/1/2013	53	ANSWER to 47 SECOND Amended Complaint filed by Amazon.com, Inc..(Mahoney, Scott) (Entered: 10/01/2013)
		* * *
10/15/2013	55	NOTICE from the U.S. Supreme Court re 21 Notice of Appeal filed by Jesse Busk and Laurie Castro. The petition for a writ of certiorari in the above entitled case was filed on October 3, 2013 and placed on the docket October 8, 2013 as No. 13–433. (AC) (Entered: 10/15/2013)
		* * *
2/19/2014	66	TRANSFER ORDER (MDL No. 2504) Signed by MDL Panel on 2/19/14. (Attachments: #1 Minute Order) (Copies have been distributed pursuant to the NEF – MMM) (Entered: 02/20/2014)
2/19/2014	67	*CERTIFIED* TRANSFER ORDER (MDL No. 2504). Signed by MDL Panel on 2/19/14. (Copies have been distributed pursuant to the NEF – MMM) (Entered: 02/20/2014)

Date Filed	#	Docket Text
2/21/2014	68	TRANSMITTAL RETURN. Transferred case opened in Western District of Kentucky as case 3:14–cv–00139 on 2/21/2014. (MMM) (Entered: 02/21/2014)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11-16892

JESSE BUSK; LAURIE CASTRO,
on behalf of themselves and
all others similarly situated,

v.

INTEGRITY STAFFING SOLUTIONS, INC.,

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
8/8/2011	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 08/15/2011. Appellants Jesse Busk, Laurie Castro opening brief due 11/14/2011. Appellee Integrity Staffing Solutions, Inc. answering brief due 12/14/2011. Appellant's optional reply brief is due 14 days after service of the answering brief. [7846658] (GR)

* * *

Date Filed	#	Docket Text
12/14/2011	8	Submitted (ECF) Opening brief for review. Submitted by Appellants Jesse Busk and Laurie Castro. Date of service: 12/14/2011. [8001282] (MRT)
		* * *
12/15/2011	10	Filed Appellants Jesse Busk and Laurie Castro excerpts of record in 2 volumes. Served on 12/14/2011. [8002573] (RH)
		* * *
1/27/2012	15	Submitted (ECF) Answering brief for review. Submitted by Appellee Integrity Staffing Solutions, Inc. Date of service: 01/27/2012. [8047680] (RLG)
		* * *
2/10/2012	18	Submitted (ECF) Reply brief for review. Submitted by Appellants Jesse Busk and Laurie Castro. Date of service: 02/10/2012. [8065438] (MRT)
		* * *
3/27/2012	21	Filed (ECF) Appellants Jesse Busk and Laurie Castro citation of supplemental authorities. Date of service: 03/27/2012. [8119044] (MRT)

Date Filed	#	Docket Text
4/5/2012	22	Filed (ECF) Appellee Integrity Staffing Solutions, Inc. citation of supplemental authorities. Date of service: 04/05/2012. [8129785] -- [COURT UPDATE: Amended docket text to reflect the content of the filing. Resent NDA. 04/05/2012 by DB] (RLG)
		* * *
2/12/2013	29	ARGUED AND SUBMITTED TO JEROME FARRIS, SIDNEY R. THOMAS and N. RANDY SMITH. [8511501] (BY)
4/12/2013	30	FILED OPINION (JEROME FARRIS, SIDNEY R. THOMAS and N. RANDY SMITH) AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Each party shall bear its own costs on appeal. Judge: JF, Judge: SRT Authoring, Judge: NRS. FILED AND ENTERED JUDGMENT. [8587628] (PH)
		* * *

Date Filed	#	Docket Text
5/3/2013	35	Filed (ECF) Appellee Integrity Staffing Solutions, Inc. petition for panel rehearing and petition for rehearing en banc (from 04/12/2013 opinion). Date of service: 05/03/2013. [8616163] (RLG)
5/13/2013	36	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Retail Litigation Center, Inc. Date of service: 05/13/2013. [8626312] (KDS)
		* * *
6/3/2013	38	Filed order (JEROME FARRIS, SIDNEY R. THOMAS and N. RANDY SMITH) The panel has unanimously voted to deny the petition for rehearing. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P 35(b). The petition for rehearing and the petition for rehearing en banc are denied. [8651967] (WL)
6/12/2013	39	MANDATE ISSUED. (JF, SRT and NRS) [8665114] (RL)

Date Filed	#	Docket Text
		* * *
10/15/2013	41	Received notice from the Supreme Court: petition for certiorari filed on 10/03/2013. Supreme Court Number 13-433. [8820752] (RR)
3/7/2014	42	Received notice from the Supreme Court. Petition for certiorari GRANTED on 03/03/2014. Supreme Court Number 13-433. [9006981] (RR)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. 2:10-cv-01854-RLH-RJJ

JESSE BUSK and LAURIE CASTRO,
on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

INTEGRITY STAFFING SOLUTIONS, INC.
and DOES 1-50, inclusive,

Defendants.

Filed December 15, 2010
Document 11

FIRST AMENDED COLLECTIVE AND CLASS ACTION COMPLAINT

COMES NOW PLANTIFFS JESSE BUSK AND LAURIE CASTRO, on behalf of themselves, and all others similarly situated, and allege:

JURISDICTION AND VENUE

1. Pursuant to Section 16(b) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b), this court has original jurisdiction over all claims for overtime and minimum wage compensation which occurred within three years of the acts complained of herein by Plaintiff, for himself and all others similarly situated, who, after notice, "opt-in" to this action by filing a consent to sue.

2. Pursuant to the Class Action Fairness Act, 29 U.S.C. § 1334(d), this court has jurisdiction over all claims complained of within three years of the filing of this complaint which are alleged to be a violation of Nevada law as alleged herein by Plaintiff, for himself and all others similarly situated, on a traditional "opt out" basis pursuant to Federal Rule of Civil Procedure Rule 23 for the reasons stated, inter alia, by the United States Court of Appeals for the Ninth Circuit in the case of *Wang v. Chinese Daily News, Inc.*, 2010 U.S. App. LEXIS 19929 (9th Cir. Cal. Sept. 27, 2010).

3. The amount in controversy exceeds five million dollars and there is the requisite minimum diversity of citizenship between the members of the class and Defendant.

4. Venue is proper in tills court because Plaintiff resides, the work was performed, and the wages were paid in Clark County, Nevada.

PARTIES

5. Defendant INTEGRITY STAFFING SOLUTIONS INC., is a foreign corporation and/or other business entity which leases warehouse and other hourly paid employees to customers like Amazon.Com, Inc, in the customer's Las Vegas, Nevada, location and at all other Amazon.Com, Inc., warehouse facilities throughout the United States. Upon information and belief, Defendant Integrity derives over a million dollars annually from such interstate business operations.

6. Plaintiff Busk is a resident of Las Vegas, Clark County, Nevada, and was employed for more than three years by Defendant as an hourly

warehouse employee in its Las Vegas, Nevada, facility.

7. Plaintiff Castro is a resident of Reno, Washoe County, Nevada, and was employed by Defendant as an hourly warehouse employee in its Fernley, Nevada, facility. Defendant terminated Plaintiff on or about December 7, 2010.

8. Plaintiff is unaware of the true names or capacities of the Defendants sued herein under the fictitious names DOES 1-10, but prays for leave to amend and serve such fictitiously named Defendants once their names and capacities become known. Plaintiff is informed and believes, and thereon alleges, that Does 1-50 are and were joint employers, partners, agents, owners, shareholders, managers or employees of Defendant, and were acting on behalf of Defendant.

BACKGROUND FACTS

A. The Policies

9. Defendant INTEGRITY STAFFING SOLUTIONS INC., is in the business of providing labor services to other companies and businesses throughout the United States, which includes providing the staffing for warehouses owned and/or operated by Amazon.com.

10. Defendant is the employer of Plaintiffs, and exercises direct control over the hours and wages of Plaintiffs and all similarly-situated hourly shift employees at all Amazon.com's warehouse locations nationwide. Upon information and belief, Defendants employ hundreds of hourly warehouse employees like Plaintiffs at each of the warehouse operations who

are subject to the same security clearance and meal break policies complained of herein.

11. Defendant maintains, enforces and/or implements the following Security Clearance and Meal Break policies (among others) for all its hourly paid employees working at Amazon.com and other warehouse locations throughout the United States:

> *Security Clearance Policy:* Like all other hourly warehouse employees employed, Plaintiffs were required to undergo a daily security clearance at the end of each shift. Plaintiffs were not compensated for the time spent undergoing the security clearance before they were released from work and permitted to leave the warehouse facility. Defendants' policy of requiring hourly warehouse employees to undergo a thorough security clearance before being released from work and permitted to leave the facility was solely for the benefit of the employers and their customers.
>
> *Meal Period Policy:* Like all other hourly warehouse employees, Plaintiffs were required to spend up to 10 minutes per day during their meal period walking to and from the cafeteria and/or undergoing security clearances. Thus, Plaintiffs were only permitted to take a 20-minute uninterrupted meal period even though he was forced to clock-out for 30-minutes.

B. Application of the Meal Break Policies to Workers Employed at Amazon.com Locations

12. The Las Vegas and Fernley Amazon.Com distribution warehouses facilities are enormous in that each covers approximately seven football fields in total area.

13. As warehouse employees, Plaintiffs fulfilled orders made by Amazon.Com customers. Plaintiffs walked throughout their respective warehouse facilities with collection carts and retrieved products from the shelf and directed the product to be distributed to Amazon.Com customers. Given the size of the facilities, Plaintiffs walked a significant amount of mileage each and every day and spent a significant amount of time walking from one end of the facility to another.

14. Because of the size of the facilities, Plaintiffs and all other similarly-situated warehouse workers were permitted and able to take only a 20-minute meal period. While Plaintiffs and all other similarly-situated warehouse workers clocked out for a 30-minute period of time for meal breaks, they never achieved a 30-minute meal period. After clocking out of the timekeeping system, it would take approximately five minutes for Plaintiffs and all other similarly-situated warehouse workers to walk to the facility cafeteria and/or pass through security clearances. It would then take Plaintiffs and all other similarly-situated warehouse workers approximately five minutes to walk from the cafeteria to the time keeping system to clock back in. Frequently, Defendants' managers would remind Plaintiffs and all other similarly-situated warehouse workers to

finish their meal period quickly so that they would clock back in on time—30-minutes after the time they clocked out for the meal period.

C. Application of the Security Clearance Policies to Workers Employed at Amazon.Com Locations

15. Pursuant to Defendants' policies and practices, Plaintiffs and all other similarly-situated warehouse workers were required to go through a security search before leaving the facilities at the end of the day. The search was to prevent employee theft, and it is an essential part of the job of a warehouse worker that they not take items from the warehouse out of the warehouse other than in the ways proscribed by the company. In fact, not contributing to "shrinkage" and abiding by company procedures for inventory control is an integral aspect of the Plaintiff's job.

16. At the end of their respective shifts, hundreds of warehouse employees would walk to the timekeeping system to clock out and were then required to wait in line in order to be searched for possible warehouse items taken without permission and/or other contraband. Thus, at the direction and control of the Defendant, and solely for the benefit of the employer and/or their customers, Plaintiffs and all other similarly-situated warehouse workers were required to wait approximately 25 minutes each day at the end of each shift without any compensation in order to undergo a search for possible contraband or pilferage of inventory of his or her person. Defendants forced Plaintiffs and all other similarly situated warehouse workers to undergo a post 9/11 type of airport security clearance—i.e., warehouse

employees were required to remove all personal belongings from their person such as wallets, keys, and belts, and pass through metal detectors before being released from work and allowed to leave the facility. Additionally, warehouse employees were unable to engage in any personal activities during the wait. In fact, Defendants' policies and practices required warehouse employees to leave their personal belongings such as cell phones in their vehicles.

17. Defendants did not pay any of their warehouse employees anything for the time spent waiting for and undergoing such daily security clearances.

18. Defendants did not pay any of their warehouse employees at a rate equal to or greater than one and one-half her regular hourly rate of pay whenever they required, suffered, or permitted the warehouse employees, including Plaintiffs, to work more than forty (40) hours per week, or more than eight (8) hours in a day.

CLASS AND COLLECTIVE ACTION ALLEGATIONS

19. Plaintiffs reallege and incorporate by this reference all the paragraphs above in this Complaint as though fully set forth herein.

20. As set forth more fully below, Plaintiffs bring this action on behalf of themselves and other similarly-situated employees in two ways: a collective action under the FLSA and a true class action under Nevada law.

21. Plaintiffs seek to represent the following two classes:

FLSA Class: All persons employed by Defendant as hourly warehouse employee within the United States at any time within three years prior to the original filing of this Complaint and who file their consents to join this collective action as a party plaintiff pursuant to 29 U.S.C. § 216(b).

Nevada Class: All person employed by Defendant as hourly warehouse employee within the State of Nevada at anytime within three years prior to the original filing date of this Complaint.

22. Plaintiffs are members of the FLSA and Nevada Classes alleged in this Complaint.

23. Plaintiffs have signed consents to sue that either have been, or shortly will be, filed in this Court.

24. The classes consist of potentially several hundred employees of Defendants, and likely more, which is so numerous that joinder of the class is impracticable. The class is easily ascertainable from the records that the employer is required by law to maintain. When available, a true opt-out class action is superior to individual actions because it would be unjust to allow the Defendants to benefit from their unlawful behavior solely because the cost of litigating individual claims would be prohibitive compared to the expected damages unless aggregated.

25. There is a well-defined community of interest in the question of law and fact affecting the class members Plaintiffs seek to represent. The class members' claims against Defendants involve

questions of common or general interest, in that their claims are based on Defendants' implementation and utilization of a policy whereby all members of the classes were required, suffered, or permitted to undergo security clearances without compensation prior to being released from work and permitted to leave the warehouse facility; nor did class members receive a bona fide meal period in violation of the FLSA or an uninterrupted 30-minute meal period in violation of Nevada law. These questions are such that proof of facts common to the members of each class will entitle such class members to relief requested in this Complaint.

26. Plaintiffs will fairly and adequately represent the interests of the class members because Plaintiffs are members of each class, have common issues of law and/or fact with all members of the class, and their claim is typical of those in each class.

27. Plaintiffs request permission to amend the Complaint to include additional class representatives if Plaintiffs individually or collective are deemed not to be an adequate representatives of any class.

FIRST CAUSE OF ACTION

Failure to Pay Wages For Security Clearances in Violation of FLSA, 29 U.S.C. §201, et seq.

(By Plaintiffs and the FLSA Class against Defendants)

28. Plaintiffs reallege and incorporate by this reference all allegations contained above as though fully set forth herein.

29. Pursuant to the FLSA, 29 U.S.C. § 201, et seq., Plaintiffs and the members of the FLSA Class

are entitled to compensation at their regular rate for all hours actually worked, and are also entitled to wages at a rate not less than one and one-half times their regular rate of pay for all hours worked in excess of forty (40) hours in any workweek.

30. Defendants are engaged in communication, business, and transmission throughout the United States and is, therefore, engaged in commerce within the meaning of 29 U.S.C. § 203(b).

31. 29 U.S.C. § 206(a)(1) states that "Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates: (1) except as otherwise provided in this section, not less than (A) $5.85 an hour beginning on the 60th day after the enactment of the Fair Minimum Wage Act of 2007; (B) $6.55 an hour, beginning 12 months after that 60th day; and C) $7.25 an hour, beginning 24 months after that 60th day.

32. 29 U.S.C. § 207(a)(1) provides in pertinent part: "Except as otherwise provided in this section, no employer shall employ any his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than

one and one-half times the regular rate at which he is employed."

33. There is no exception from the provisions of 29 U.S.C. §§ 206(a)(1) and/or 207(a)(1) applicable to the Plaintiffs and the other hourly shift workers that constitute the class herein.

34. 29 U.S.C. § 255 provides that a three-year statute of limitations applies to willful violations of the FLSA.

35. Requiring employees to undergo security clearances herein is integral and indispensible to Plaintiffs' duties and solely for the benefit of Defendants, necessary Defendants' business operations, not incidental, and not *de minimis* individually or in the aggregate.

36. At all relevant times, Defendants failed to pay Plaintiffs and the other members of the FLSA Class their regular rate for all hours worked by not paying them for thirty minutes a day taken as a "lunch break" when they were not free to leave the premises and were required to eat their lunch at designated areas five minutes away from where they had to punch in and out for their lunch break. By forcing the employees to walk to punch a time clock five minutes away from where they could actually eat, the employees were not relieved from all duties, i.e. the duty to walk to the lunch room in order to eat lunch, for about one third (ten minutes) of their 30 minute lunch. Lunch periods of less than 30 minutes are usually compensable under 29 CFR 785.19, when, as here, the employer simply could have put another time clock in a more accusable location.

37. In addition, Defendants failed to pay Plaintiffs and the other members of the FLSA Class the minimum wages and, if applicable, overtime pay for all hours worked by not paying the employees anything for time spent waiting for a mandatory post shift security check.

38. The waiting was for the benefit of the employer, necessary to the employer's task of minimizing "shrinkage" or loss of product from warehouse theft, and could have easily been reduced to a de minimus amount by the addition of more security checkers and/or staggering the termination of the shift so people would flow though the clearance more quickly.

39. Plaintiffs propose to undertake the appropriate proceedings to have the FLSA Class members, aggrieved by Defendants' unlawful conduct, notified of the pendency of this action and join this action as Plaintiffs, pursuant to 29 U.S.C. § 216(b)

40. Therefore, Plaintiffs demand that they, and the members of the FLSA Class, be paid wages at the higher of 1) their regular rate for all hours worked, including time spent at post shift security clearances 2) the minimum hourly wage for all time spent at post shift security clearances or 3) when applicable, the appropriate overtime hourly premium rate as required by the FLSA for all time spent at post shift security clearances as provided by law.

41. Because the actions of Defendant were without substantial justification as required by, 29 U.S.C § 260, Plaintiffs request the amount of damages be doubled, not as a penalty, but in lieu of

interest and as liquidated damages as provided in 29 U.S.C. 216(b).

SECOND CAUSE OF ACTION

Failure to Pay Wages For Meal Period in Violation of FLSA, 29 U.S.C. §201, et seq.

(By Plaintiffs and the FLSA Class against Defendants)

42. Plaintiffs reallege and incorporate by this reference all allegations contained above as though fully set forth herein.

43. For a meal period to be "bona fide," it must be at least 30 minutes and the employee must be completely relieved of all active or inactive duties. *See* 29 C.F.R. § 785.19.

44. It was Defendants' policies and practices to require Plaintiffs to clock out for a 30-minute meal period. Plaintiffs, however, only received a 20-minute bona fide meal period.

45. Therefore, Plaintiffs demand that themselves and the members of the FLSA Class be paid wages at the higher of 1) their regular rate for all hours worked, 2) the minimum hourly wage or 3) when applicable, the appropriate overtime hourly premium rate as required by the FLSA for Defendants' violation.

46. The conduct complained of herein is a part of the principal activity of the Defendants, necessary for its business operations, not incidental, and not *de minimis* individually or in the aggregate.

47. Because the actions of Defendants were without substantial justification as required by, 29

U.S.C. § 260, Plaintiffs request the amount of damages be doubled, not as a penalty, but in lieu of interest and as liquidated damages as provided in 29 U.S.C. 216(b).

THIRD CAUSE OF ACTION

Failure to Pay Overtime in
Violation of NRS 608.016 and 608.018

(By Plaintiffs and the Nevada
Class against Defendants)

48. Plaintiffs reallege and incorporate by this reference all allegations contained above as though fully set forth herein.

49. By the conduct described above, Defendants have violated the provisions of Nevada Revised Statutes (NRS) 608.016, which provides "An employer shall pay to the employee wages for each hour the employee works. An employer shall not require an employee to work without wages during a trial or break-in period."

50. NRS 608.018(1) provides that "An employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee who receives compensation for employment at a rate less than 1 1/2 times the minimum rate prescribed pursuant to NRS 608.250 works: (a) More than 40 hours in any scheduled week of work; or (b) More than 8 hours in any workday unless by mutual agreement the employee works a scheduled 10 hours per day for 4 calendar days within any scheduled week of work."

51. During all times applicable herein, Defendants paid their hourly warehouse workers employment at a rate less than 1 1/2 times the

minimum rate prescribed by the Labor Commissioner pursuant to NRS 608.250.

52. The legislature for the state of Nevada has created a private cause of action for non-payment of wages due pursuant to the term of any employment, including overtime wages due, pursuant to NRS 608.140. Plaintiffs made a demand upon Defendants on behalf of the class of hourly workers for all sums claimed herein under state labor laws on October 2, 2010, a copy is attached herein as Exhibit "A."

53. Therefore, Plaintiffs demand that they and the members of the Nevada Class be paid wages at the applicable regular or overtime rate for all hours worked including time spent waiting for and undergoing security clearances before and after their regular shift time, plus interest and attorneys' fees as provided by law.

FOURTH CAUSE OF ACTION

Failure to Permit 30-Minute Meal Period in Violation of NRS 608.019

(By Plaintiffs and the Nevada Class against Defendants)

54. Plaintiffs reallege and incorporate by this reference all allegations contained above as though fully set forth herein.

55. NRS 608.019 provides that "An employer shall not employ an employee for a continuous period of 8 hours without permitting the employee to have a meal period of at least one-half hour. No period of less than 30 minutes interrupts a continuous period of work for the purpose of this subsection." In other words, an employee who works at least 8 continuous

hours in a day must be permitted to take an uninterrupted 30-minute meal period under Nevada law.

56. Defendants failed to abide by NRS 608.019 by refusing to permit Nevada Class members to have an uninterrupted 30-minute meal period.

57. Given the size of the warehouse facility, and that Nevada Class members had to walk to and from the meal break area to the time keeping system, Nevada Class members were only permitted to take an uninterrupted meal break of approximately 20-minutes and not compensated for commute time during their meal periods.

58. Therefore, Plaintiffs demand that they and the members of the Nevada Class be paid wages at the applicable regular or overtime rate times 30-minutes for each and every unlawful meal period, plus interest and attorneys' fees as provided by law.

FIFTH CAUSE OF ACTION

Failure to Timely Pay Wages
Due in Violation of NRS 608.030

(By Plaintiffs and the Nevada
Class against Defendants)

59. Plaintiffs reallege and incorporate by this reference all allegations contained above as though fully set forth herein.

60. NRS 608.020 states "Whenever an employer discharges an employee, the wages and compensation earned and unpaid at the time of such discharge shall become due and payable immediately.

61. NRS 608.030 provides "Whenever an employee resigns or quits his or her employment, the wages and compensation earned and unpaid at the time of the employee's resignation or quitting must be paid no later than 1. The day on which the employee would have regularly been paid the wages or compensation; or 2. Seven days after the employee resigns or quits, whichever is earlier."

62. The consequence of violation of NRS 608.020 and NRS 608.030 is contained in NRS 608.040(1) which states: "If an employer fails to pay: (a) Within 3 days after the wages or compensation of a discharged employee becomes due; or (b) On the day the wages or compensation is due to an employee who resigns or quits, the wages or compensation of the employee continues at the same rate from the day the employee resigned, quit or was discharged until paid or for 30 days, whichever is less."

63. NRS 608.050 expressly gives the terminated employees a private cause of action to collect these sums when it states: "Whenever an employer of labor shall discharge or lay off employees without first paying them the amount of any wages or salary then due them, in cash and lawful money of the United States, or its equivalent, or shall fail, or refuse on demand, to pay them in like money, or its equivalent, the amount of any wages or salary at the time the same becomes due and owing to them under their contract of employment, whether employed by the hour, day, week or month, each of the employees may charge and collect wages in the sum agreed upon in the contract of employment for each day the employer is in default, until the employee is paid in

full, without rendering any service therefore; but the employee shall cease to draw such wages or salary 30 days after such default. 2. Every employee shall have a lien as provided in NRS 108.221 to 108.246, inclusive, and all other rights and remedies for the protection and enforcement of such salary or wages as the employee would have been entitled to had the employee rendered services therefore in the manner as last employed."

64. Plaintiffs demand that themselves and members of the Nevada Class who have been terminated but who were not paid all wages due be paid the thirty full days of wages plus interest and attorneys' fees as provided by law.

PRAYER

WHEREFORE, PLAINTIFFS pray for judgment against the Defendants as follows:

1. An order conditionally certifying the FLSA Class as a collective action as alleged and prayed herein;

2. An order pursuant to Rule 23 of the Federal Rules of Civil Procedure, certifying the Nevada Class as alleged and prayed herein or on such terms as the Court deems applicable to this case;

3. Damages according to proof for regular rate pay under federal law for all hours worked;

4. Damages according to proof for minimum rate pay under federal law for all hours worked;

5. Damages according to proof for overtime compensation under federal law for all hours worked over 40 per week within three years of the filing of the complaint until the date of entry of judgment;

7. Damages according to proof for minimum rate pay under Nevada law for all hours worked;

8. Damages according to proof for overtime compensation under Nevada law for all hours worked over 8 per day and/or 40 per week by members of the Nevada Class within three years of the filing of the complaint until the date of entry of judgment

9. For all statutory damages according to proof;

10. For liquidated damages as provide by law on the federal claims

11. In the alternative, if the Court determines liquidated damages are not appropriate, then for interest at the maximum legal rate on all amounts found due from the date of the undue overtime until paid in full;

12. For reasonable attorney's fees according to proof;

13. For such other relief as the Court deems just and proper.

Dated: December 15, 2010.

THIERMAN LAW FIRM
By:/s/Mark R. Thierman
Mark R. Thierman Cal NB# 8285
7287 Lakeside Drive
Reno, Nevada 89511
Tel: (775) 284-1500

Exhibit A

THIERMAN LAW FIRM, P.C.
California and Nevada Labor Relations
and Employment Law
7287 Lakeside Drive
Reno, Nevada 89511
(775) 284-1500 or (877) 99-LABOR
(775) 703-5027 or (775) 284-1506 Fax
email: laborlawyer@pacbell.net
www.laborlawyer.net

October 2, 2010

Integrity Staffing Solutions, Inc.
750 South Madison Street
Suite 300
Wilmington, De 19801

Dear Sirs:

This office represents JESSE BUSK who worked in your Las Vegas Amazon warehouse. Pursuant to NRS 608.140, we are hereby giving you notice of our demand that you pay all hourly warehouse employees employed within the last three years in the state of Nevada for the time they spent waiting for and undergoing security checks and searches for theft or contraband. You may tender payment at the applicable hourly, daily and weekly overtime rates for the entire class to our trust account. Please include the employee's last known address so we can make proper distribution.

Thank you very much for your prompt response.

Very truly yours,

s/_____
Mark R. Thierman * * *

PETITIONER'S BRIEF

No. 13-433

In the Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC.,

Petitioner,

v.

JESSE BUSK and LAURIE CASTRO, on behalf of themselves and all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

NEIL M. ALEXANDER
RICK D. ROSKELLEY
ROGER L. GRANDGENETT II
CORY GLEN WALKER
LITTLER MENDELSON
3960 Howard Hughes Parkway, Suite 300
Las Vegas, NV 89169
(702) 862-8800

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
BARBARA A. SMITH
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

May 28, 2014

QUESTION PRESENTED

Respondents are warehouse workers who seek back pay, overtime, and double damages under the Fair Labor Standards Act ("FLSA") for time spent in security screenings after the end of their work shifts. Relying on an unbroken line of authority from other jurisdictions, the district court dismissed Respondents' claims because security screenings are quintessential "preliminary" or "postliminary" activities that are non-compensable under the FLSA pursuant to the Portal-to-Portal Act of 1947. The Ninth Circuit reversed, holding that time spent in security screenings was compensable under the FLSA because it was "necessary to [Respondents'] primary work as warehouse employees." That holding squarely conflicts with decisions from the Second and Eleventh Circuits holding that time spent in security screenings is not subject to the FLSA because it is *not* "integral and indispensable" to employees' principal job activities.

The question presented is whether time spent in security screenings is compensable under the FLSA, as amended by the Portal-to-Portal Act.

PARTIES TO THE PROCEEDING

Petitioner Integrity Staffing Solutions, Inc. was the defendant in the district court and appellee in the Ninth Circuit. Respondents Jesse Busk and Laurie Castro were plaintiffs in the district court and appellants in the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner Integrity Staffing Solutions, Inc. does not have a parent corporation, and no publicly traded corporation owns 10% or more of its stock.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
CORPORATE DISCLOSURE STATEMENT iii
TABLE OF AUTHORITIES vi
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 1
A. The Fair Labor Standards Act and Early Judicial Interpretations of "Work" and "Workweek" 3
B. The Portal-to-Portal Act 7
C. This Court's and DOL's Interpretation of "Preliminary" and "Postliminary" Activities 9
D. Respondents' Complaint and the District Court's Decision 12
E. The Ninth Circuit's Decision 14
SUMMARY OF ARGUMENT 15
ARGUMENT 21
I. Respondents Cannot State A Claim Under The FLSA For Time Spent Waiting For A Security Screening 21
A. Waiting in Line for a Security Screening is a Quintessential Example of a Non-Compensable Preliminary or Postliminary Activity. 21

B. Other Than the Decision Below, Every Court To Consider This Issue Has Correctly Held That Security Screenings Are Not Compensable Under the FLSA. ... 30

II. The Ninth Circuit Badly Misconstrued The Portal-to-Portal Act. ... 33

A. The Ninth Circuit's "Required-and-Beneficial" Test is Inconsistent With the Text and History of the Act, This Court's Precedents, and DOL's Regulations. ... 33

B. The Ninth Circuit and Respondents Define the Relevant "Principal Activities" Far Too Broadly ... 38

C. The Number of Employees Screened Is Legally Irrelevant ... 40

III. The Ninth Circuit's Decision Upends The Carefully Crafted Regulatory Regime Embodied In The FLSA And Portal-to-Portal Act. ... 43

CONCLUSION ... 49

STATUTORY APPENDIX

29 U.S.C. § 251 ... 1a

29 U.S.C. § 254 ... 4a

29 C.F.R. § 790.7 ... 7a

29 C.F.R. § 790.8 ... 14a

TABLE OF AUTHORITIES

Cases

Adair v. ConAgra Foods,
728 F.3d 849 (8th Cir. 2013) 23

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 680 (1946) ..... *passim*

Anderson v. Perdue Farms,
604 F Supp. 2d 1339 (M.D. Ala. 2009) 32

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 41

Bonilla v. Baker Concrete Construction,
487 F.3d 1340 (11th Cir. 2007) 31, 37

Caperton v. A.T. Massey Coal Co.,
556 U.S. 868 (2009) 35

Christopher v. SmithKline Beecham,
132 S. Ct. 2156 (2012) 43, 48

Gorman v. Consolidated Edison Corp.,
488 F.3d 586 (2d Cir. 2007) ..... *passim*

IBP v. Alvarez,
546 U.S. 21 (2005) ..... *passim*

Jewell Ridge Coal Corp.
v. Local No. 6167, United Mine Workers,
325 U.S. 161 (1945) 5

Jones v. Best Buy Co.,
No. 12-cv-95 (D. Minn. Apr. 12, 2012) 32

Mitchell v. King Packing Co.,
350 U.S. 260 (1956) 10, 17, 27, 48

Sandifer v. U.S. Steel Corp.,
134 S. Ct. 870 (2014) 5, 46

Sepulveda v. Allen Family Foods, Inc., 591 F.3d 209 (4th Cir. 2009) 46

Sleiman v. DHL Express, No. 09-414, 2009 WL 1152187 (E.D. Pa. Apr. 27, 2009) 32

Steiner v. Mitchell, 350 U.S. 247 (1956) ..... *passim*

Tennessee Coal, Iron & R. Co. v. Muscoda, 321 U.S. 590 (1944) 5, 21

Tum v. Barber Foods, 360 F.3d 274 (1st Cir. 2004) 26, 34

Whalen v. United States, 93 Fed. Cl. 579 (2010) 32

White v. Tip-Top Poultry, No. 07-0101, 2008 U.S. Dist. LEXIS 110598 (N.D. Ga. Oct. 7, 2008) 32

Yi v. Sterling Collision Centers, 480 F.3d 505 (7th Cir. 2007) 48

Statutes & Regulations

29 U.S.C. § 202(a) 4

29 U.S.C. § 206 ..... 1, 4

29 U.S.C. § 207 ..... 1, 4

29 U.S.C. § 216(b) 4

29 U.S.C. § 251(a) 8, 21, 22, 46

29 U.S.C. § 254(a) 2, 9, 22, 33

29 U.S.C. § 254(b) 9, 45

29 C.F.R. § 790.7(f) 11, 17, 36, 38

29 C.F.R. § 790.7(g) ..... *passim*

29 C.F.R. § 790.8(a) ..... *passim*

Other Authorities

93 Cong. Rec. 2089 (1947) 47

93 Cong. Rec. 2297 (1947) 9, 25

Class Action & FLSA Collective Action Complaint, *Allison v. Amazon.com*, No. 2:13-cv-1612 (W.D. Wash. Sept. 6, 2013) 47

Class Action Complaint, *Frlekin v. Apple Inc.*, No. 3:13-cv-3451 (N.D. Cal. July 25, 2013) 47

Class Action Complaint, *Vance v. Amazon.com*, No. 3:13-cv-765 (W.D. Ky. Aug. 1, 2013) 47

Collective Action & Class Action Complaint, *Johnson v. Amazon.com*, No. 1:13-cv-153 (W.D. Ky. Sept. 17, 2013) 47

Collective Action Complaint, *Johnson v. Amazon.com DEDC, LLC*, No. 3:14-1797 (D.S.C. May 2, 2014) 47

First Amended Class Action Complaint, *Ceja-Corona v. CVS*, No. 1:12-cv-1868 (E.D. Cal. July 15, 2013) 47

Transfer Order, *In re Amazon.com Fulfillment Center FLSA Litig.*, MDL-2504 (Feb. 19, 2014) 15

Harvard Coll. Library, *Admittance* (2014), http://hcl.harvard.edu/info/admittance 44

Aaron Kase, *Amazon Workers Want Pay for Time Spent at Security Checkpoint*, Lawyers.com (Apr. 25, 2013), http://blogs.lawyers.com/2013/04/amazon-workers-want-pay-for-time-at-security/ 47

Payment Deferred, Time (Jan. 6, 1947) 7

Portal-to-Portal Wages: Hearings on S. 70 Before a Subcomm. on the Judiciary, 80th Cong. (Jan. 1947) 8

S. Rep. No. 75-884 (1937) 4

S. Rep. No. 80-37 (1947) 7, 25

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 713 F.3d 525 and reproduced at Pet.App.1-17. The district court's opinion is reproduced at Pet.App.19-35.

JURISDICTION

The Ninth Circuit issued its decision on April 12, 2013. A timely petition for panel rehearing and rehearing *en banc* was denied on June 3, 2013. This Court granted certiorari on March 3, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251, 254, and the Department of Labor's regulations, 29 C.F.R. §§ 790.7, 790.8, are reproduced in the appendix to this brief. App.1a-18a.

STATEMENT OF THE CASE

The Fair Labor Standards Act of 1938 ("FLSA") sets a minimum hourly wage and requires overtime compensation when a covered employee works more than 40 hours in a "workweek." *See* 29 U.S.C. §§ 206, 207. Early judicial interpretations of the FLSA adopted an expansive conception of "work" and "workweek," holding that employees must be compensated for all time *spent on the employer's premises*, even if they were not engaged in productive work. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). Those decisions resulted in a flood of litigation in which employees sought billions of dollars of back pay for pre- and post-shift activities that had little to do with their actual job duties, such

as walking between the factory gate and their work stations.

Congress responded quickly and unequivocally by enacting the Portal-to-Portal Act of 1947, which makes clear that the FLSA's compensation mandates apply only to employees' primary job duties, not to activities that are "preliminary" or "postliminary" to that work. 29 U.S.C. § 254(a). This Court has construed the Portal-to-Portal Act as requiring compensation only for tasks that are an "*integral and indispensable* part of the principal activities for which covered workmen are employed." *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956) (emphasis added). That is, an activity is compensable under the FLSA only if it is so integral and indispensable to the employees' other primary activities that it too counts as part of those primary activities.

Petitioner Integrity Staffing Solutions provides staffing for warehouses owned by Amazon.com. Respondents are former Integrity warehouse employees; their primary job duties involved retrieving items from inventory and packaging those items for delivery to Amazon.com customers. After clocking out at the end of their shifts, Respondents passed through a short security screening before exiting the building, in which they removed personal belongings (if any) from their pockets and walked through a metal detector.

In October 2010, Respondents filed a class-action complaint against Integrity, alleging violations of the FLSA and seeking back pay and overtime (plus double damages) for time spent waiting in line for security screenings. The district court granted

Integrity's motion to dismiss, recognizing—correctly—that Respondents were not entitled to compensation under the FLSA because time spent waiting in line and passing through a security screening was not "integral and indispensable" to Respondents' principal activities of "fulfilling online purchase orders." Pet.App.27. As the court explained, security screenings "fall squarely into a non-compensable category of postliminary activities such as checking in and out and waiting in line to do so and 'waiting in line to receive pay checks.'" Pet.App.27-28.

In a stark departure from an otherwise-unbroken line of authority, the Ninth Circuit reversed, holding that Respondents could state a claim under the FLSA based on Integrity's failure to provide compensation for time spent in post-shift security screenings. In its brief analysis of this issue, the Ninth Circuit concluded that the security screenings were compensable under the FLSA because they were "required" by Integrity and performed "for Integrity's benefit." Pet.App.11-12. Like the *Mt. Clemens* decision that Congress abrogated in the Portal-to-Portal Act, the Ninth Circuit's decision in this case has spawned numerous class-action suits seeking back pay and double damages for activities unrelated to employees' actual job duties.

A. The Fair Labor Standards Act and Early Judicial Interpretations of "Work" and "Workweek"

Congress enacted the FLSA in 1938 to address "labor conditions detrimental to the maintenance of

the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). The statute's declared objectives were "to improve ... the standard of living of those who are now undernourished, poorly clad, and ill-housed," and to "protect this Nation from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health." S. Rep. No. 75-884, at 3-4 (1937).

The FLSA was not designed to comprehensively regulate working conditions or to displace the collective bargaining process. Its objectives were far more modest. It was designed to establish "a few rudimentary standards" so basic that "[f]ailure to observe them [would have to] be regarded as socially and economically oppressive and unwarranted under almost any circumstance." *Id.* at 3. The Act therefore proscribed the use of child labor, imposed a minimum wage for most jobs, and established a general rule that individuals working more than 40 hours in a given "workweek" were entitled to time-and-one-half pay for those additional hours. *See* 29 U.S.C. §§ 206, 207. An employer that violates the FLSA can be subject to civil liability for back pay, double damages, and attorneys' fees. *Id.* § 216(b).

Even though the FLSA had far-reaching implications for both employers and employees, Congress failed to define several critical terms at the heart of the statutory scheme. In particular, many of the FLSA's obligations are based on an employee's "work" or "workweek," but Congress did not define either term. Confusion over the meaning of those

terms "soon let loose a landslide of litigation." *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 875 (2014).

When that litigation reached this Court, it adopted an expansive interpretation of "work" in *Tennessee Coal, Iron & R. Co. v. Muscoda,* 321 U.S. 590 (1944), holding that time spent traveling from the "portal" of a mine to the underground working area was compensable under the FLSA. The Court broadly defined "work" as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Id.* at 598; *see also Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 166 (1945) (FLSA applied to underground travel to and from the portal of a coal mine because "[w]ithout such travel the coal could not be mined").

The Court went even farther in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). In that case, employees at a dishware factory argued that the FLSA required compensation for activities such as walking between the time clock and the work stations, putting on aprons and overalls, and preparing work areas for the start of production. *Id.* at 683. This Court largely agreed, holding that "the statutory workweek includes *all time during which an employee is necessarily required to be on the employer's premises*, on duty or at a prescribed workplace." *Id.* at 690-91 (emphasis added). The Court reasoned that the tasks in question were all part of the statutory "workweek" under the FLSA because they were "compelled" by the employer, and

"[w]ithout such [tasks] on the part of the employees, the productive aims of the employer could not have been achieved." *Id.* at 691.

For example, the Court noted that employees spent "2 to 12 minutes daily, if not more," walking on the employer's premises between the time clock and the work stations. *Id.* The employees engaged in such walking "only because they were compelled to do so by the necessities of the employer's business," and this activity was "under the complete control of the employer, being dependent solely upon the physical arrangements which the employer made in the factory." *Id.* The Court thus concluded that walking time was compensable because it was "'controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.'" *Id.*

Justices Burton and Frankfurter dissented in *Mt. Clemens*, sharply criticizing the breadth of the majority's holding. The dissenting Justices emphasized that "[n]one of this time would have been spent at productive work," and that "[t]he futility of requiring an employer to record these minutes and the unfairness of penalizing him, for failure to do a futile thing, by imposing arbitrary allowances for 'overtime' and liquidated damages is apparent." *Id.* at 697. Especially for small businesses, it would be "highly impractical" to record all of the "occasional minutes of preliminary activities and walking time," and any such requirement "would lead to innumerable unnecessary minor controversies between employers and employees." *Id.* at 698.

The dissenting Justices concluded that "the obvious, long established, and simple way to compensate an employee for [preliminary and postliminary] activities is to recognize those activities in the rate of pay for the particular job. *Id.* at 697. That is, "[t]hese items are appropriate for consideration in collective bargaining." *Id.*

B. The Portal-to-Portal Act

In the wake of this Court's decision in *Mt. Clemens*, unions and employees filed more than 1,500 lawsuits under the FLSA seeking nearly $6 billion in back pay and double damages for pre- and post-shift activities. *See* S. Rep. No. 80-37, at 12 (1947). Those suits "came so fast that newspapers ran lists of companies sued in long columns, like disaster victims.... The unions sued Bethlehem Steel for $200,000,000, Curtis-Wright for $29,000,000, National Biscuit Co. for $50,000,000, and prepared to sue the Ford Motor Co. for $300,000,000." *Payment Deferred*, Time (Jan. 6, 1947).

The legal theory underlying those suits was that "[f]or all the time *spent on company property*—except for insignificant amounts—a worker must be paid," even if that time was not spent performing productive work. *Id.* (emphasis added). For example, a memorandum from the United Steelworkers of America to its local chapters emphasized that, under the reasoning of *Mt. Clemens*, employees would be entitled to compensation for all "time [] spent on the employer's premises in going to and preparing for work, regardless of whether this time is spent before or after punching the time clock." *Portal-to-Portal*

Wages: Hearings on S. 70 Before a Subcomm. on the Judiciary, 80th Cong., at 27 (Jan. 1947). In one illustrative suit against the Carnegie-Illinois Steel Corporation, the United Steelworkers sought damages of more than $90 million for, *inter alia*, time spent walking between the factory gate, the time clocks, and the employee work stations. *Id.* at 22-23.

Congress responded with alacrity to this wave of litigation. In May 1947, just six months after *Mt. Clemens* was decided, Congress enacted the Portal-to-Portal Act to address this Court's "disregard of long-established customs, practices, and contracts between employers and employees." 29 U.S.C. § 251(a). Congress found that the Court's construction of the FLSA in *Jewell Ridge* and *Mt. Clemens* had resulted in "wholly unexpected liabilities, immense in amount and retroactive in operation," that threatened to "give rise to great difficulties in the sound and orderly conduct of business and industry." *Id.* Allowing those decisions to stand would result in "extended and continuous uncertainty on the part of industry," and "the courts of the country would be burdened with excessive and needless litigation." *Id.*

The Portal-to-Portal Act abrogated the core holding of *Mt. Clemens* that the FLSA applies to "all time during which an employee is necessarily required to be on the employer's premises." 328 U.S. at 690-91. The Act provides in relevant part that: "no employer shall be subject to any liability or punishment under the [FLSA]" for either: (1) time in which an employee is "walking, riding, or traveling to and from the actual place of performance of the

principal activity or activities which such employee is employed to perform," or (2) "activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time ... at which such employee commences, or subsequent to the time ... at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a). The Act also provides that, although the FLSA does not *require* compensation for "preliminary" and "postliminary" activities, employers and employees may still agree to such compensation through a contract or collective-bargaining agreement. *Id.* at § 254(b).

The legislative history of the Portal-to-Portal Act makes clear that a pre- or post-shift task would be compensable only if it was so closely related to an employee's principal job activities that it was itself a principal activity. During the floor debates, Senator Cooper—one of the chief sponsors of the Act—emphasized that an activity such as changing clothes would be compensable only "if the employee *could not perform his* [*principal*] *activity*" without it. 93 Cong. Rec. 2297-98 (1947) (emphasis added).

C. This Court's and DOL's Interpretation of "Preliminary" and "Postliminary" Activities

This Court first addressed the scope of "preliminary" and "postliminary" activities under the Portal-to-Portal Act in *Steiner v. Mitchell*, 350 U.S. 247 (1956). Based on the Act's text and legislative history, the Court concluded that "activities performed either before or after the regular work shift, on or off the production line," are compensable

under the FLSA only if they are an "*integral and indispensable* part of the principal activities for which covered workmen are employed." *Id.* at 256 (emphasis added). This Court affirmed the district court's conclusion that an activity is compensable if it is "'so closely related to other duties performed by [petitioners'] employees as to be an integral part thereof and [is], therefore, included among the principal activities of said employees.'" *Id.* at 252.

In *Steiner*, the employer did not contest that the activities were "integral and indispensable" because the plaintiffs worked with highly toxic chemicals at a battery plant, and needed to change clothes and shower at the beginning and end of their shifts to avoid contamination and health hazards. *Id.* at 249-51. Indeed, the Court noted that it was "difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of the principal activity of the employment." *Id.* at 256. Similarly, in *Mitchell v. King Packing Co.*, 350 U.S. 260, 262 (1956), the Court found that pre-shift knife-sharpening was integral and indispensable to butchers' principal job activities because "[a]ll of the knives as well as the saws must be 'razor sharp' for the proper performance of the work."

In contrast, the Court unanimously held in 2005 that time spent *waiting* to obtain protective equipment before donning it at the beginning of a shift is not compensable under the FLSA. *See IBP v. Alvarez*, 546 U.S. 21, 40-41 (2005). As the Court explained, such waiting time "comfortably qualif[ies]" as a non-compensable activity because it precedes

any primary activity and, indeed, is "two steps removed from the [employees'] productive activity on the assembly line." *Id.* at 40-42. The Court squarely rejected a simple test of necessity for determining compensable activities, holding that "the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are 'integral and indispensable' to a 'principal activity' under *Steiner*." *Id.* at 40-41. In *IBP*, the Court also held that time spent walking from the donning area to the work station was compensable, because the donning of safety equipment was so indispensable and integral to the employees' principal activities that donning was itself a principal activity that commenced the compensable workday. *Id.* at 32-37.

The Department of Labor ("DOL") promulgated interpretive regulations in the immediate wake of the Portal-to-Portal Act providing additional guidance about the meaning of "preliminary" and "postliminary" activities. Those regulations reflect Congress' evident intent to abrogate the result in *Mt. Clemens*, by clarifying that preliminary activities like punching a time clock do not begin the compensable workday. Under DOL's regulations, "checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks" are not compensable under the FLSA when "performed under the conditions normally present." 29 C.F.R. § 790.7(g); *see also id.* § 790.7(f) (compensation not required for time spent "walking or riding by an employee between the plant gate and the employee's ... actual place of performance of his principal activity").

D. Respondents' Complaint and the District Court's Decision

Respondents Jesse Busk and Laurie Castro are former Integrity employees who were placed by Integrity on temporary assignments working at Amazon warehouses in Nevada filling orders placed by Amazon.com customers. They were paid on an hourly basis by Integrity.

Respondents' principal job activities involved "walk[ing] throughout their respective warehouse facilities with collection carts and retriev[ing] products from the shelf ... to be distributed to Amazon.com customers." First Amended Complaint ¶ 13 (JA 20). At the "end of their respective shifts," Respondents would "walk to the timekeeping system to clock out" and would then "wait in line in order to be searched for possible warehouse items taken without permission and/or other contraband." *Id.* ¶ 16 (JA 21). During the screening process, employees who had carried personal items (such as wallets and keys) onto the warehouse floor at the start of their shifts would remove those items from their pockets, then walk through a metal detector. Without any supporting detail, the complaint includes the bare allegation that it could take as long as 25 minutes for workers to clear security. *Id.*

In December 2010, Respondents filed a class-action complaint against Integrity in U.S. District Court for the District of Nevada, alleging that Integrity's failure to compensate them for time spent waiting for security screenings violated the FLSA

and parallel provisions of Nevada law.[1] Respondents asserted that the security screenings were "for the benefit of the employer" and were "necessary to the employer's task of minimizing 'shrinkage' or loss of product from warehouse theft." First Amended Complaint ¶ 38 (JA 27). Respondents sought back pay and overtime, as well as double damages on the ground that Integrity's actions were "without substantial justification." *Id.* ¶¶ 29, 40-41 (JA 24-28).

Integrity filed a motion to dismiss for failure to state a claim, which the district court granted on July 19, 2011. Pet.App.27-28. Applying the test set forth by this Court in *Steiner*, 350 U.S. at 255-56, the district court held that time spent in security screenings was not compensable under the FLSA because it was not "an integral and indispensable part of the principal activity of the employment." Even though the screenings were "mandatory for all employees," the court held that they were not integral to Respondents' "principal activities as warehouse employees fulfilling online purchase orders." Pet.App.27. The court concluded that security screenings "fall squarely into a non-compensable category of postliminary activities such as checking in and out and waiting in line to do so

---

[1] Respondents also alleged that Integrity violated the FLSA and state law by failing to provide a "bona fide" 30-minute meal period. The district court dismissed that claim, Pet.App.28-32, and the Ninth Circuit affirmed, Pet.App.13-17, holding that time spent walking to and from the break room was not compensable under the FLSA.

and 'waiting in line to receive pay checks.'" Pet.App.27-28 (quoting 29 C.F.R. § 790.7(g)).

The district court further noted that "[t]he weight of authority concerning preliminary and postliminary security screenings supports this conclusion." Pet.App.28 & n.2 (citing four cases finding security screening time non-compensable under FLSA). The court emphasized that these precedents "pose difficult hurdles" for Respondents because they all hold that time spent in security screenings is non-compensable under the FLSA even if the employer had a "great" need for the screenings. Pet.App.28.

E. The Ninth Circuit's Decision

The Ninth Circuit reversed in relevant part. In an opinion by Judge Thomas issued on April 12, 2013, the court concluded that Respondents had stated a claim for relief under the FLSA based on Integrity's failure to provide compensation for time spent in security screenings. Pet.App.11-13.

Under Ninth Circuit precedent that purports to interpret this Court's decision in *Steiner*, a pre- or post-shift activity is compensable if it is: (1) "'necessary to the principal work performed'" and (2) "'done for the benefit of the employer.'" Pet.App.11. Applying that test, the Ninth Circuit emphasized that "Integrity requires the security screenings, which must be conducted at work." *Id.* The court further noted that the screenings are "intended to prevent employee theft—a plausible allegation since the employees apparently pass through the clearances only on their way out of work, not when they enter." *Id.* The Ninth Circuit thus

held that Respondents could state a claim under the FLSA because "the security clearances are necessary to employees' primary work as warehouse employees and done for Integrity's benefit." Pet.App.11-12.

The Ninth Circuit found the cases cited by the district court to be distinguishable because they involved workplaces, such as power plants and airports, in which "everyone who entered ... had to pass through a security clearance." Pet.App.12. Here, in contrast, the court concluded that the purpose of Integrity's screening process was "to prevent employee theft, a concern that stems from the nature of the employees' work (specifically, their access to merchandise)." *Id.*

The Ninth Circuit denied a petition for rehearing on June 3, 2013, and this Petition followed.[2]

SUMMARY OF ARGUMENT

The Ninth Circuit's decision cannot be squared with the text and history of the Portal-to-Portal Act, this Court's decisions interpreting that statute, and DOL's regulations.

I. Time spent passing through a security screening is a paradigmatic example of an activity that is non-compensable because it is "preliminary" or "postliminary" to employees' principal job

---

[2] To date, there have been 13 putative class-action suits filed against Amazon.com, Integrity, and other staffing companies involving more than 400,000 plaintiffs and hundreds of millions of dollars of alleged damages. The Panel on Multidistrict Litigation has ordered 11 of those cases, including this one, consolidated in the Western District of Kentucky for pretrial proceedings. *See, e.g.*, Transfer Order, *In re Amazon.com Fulfillment Center FLSA Litig.*, MDL-2504 (Feb. 19, 2014).

activities. The core purpose of the Portal-to-Portal Act was to overturn expansive judicial interpretations of the FLSA that allowed employees to recover massive damages for pre- or post-shift activities that occurred on the employer's premises and arguably benefitted the employer, but occurred before or after the employees' discharge of their principal job duties. This Court has made clear that an activity occurring before or after an employee's shift is compensable only if it is an "integral and indispensable part of the principal activities for which covered workmen are employed." *Steiner*, 350 U.S. at 256. That is, the activity in question must be so integral and indispensable to the employee's *productive work* as to be counted among the employee's principal activities.

Pre- or post-shift security screenings do not come close to satisfying that standard. Integrity employed Respondents to process and fill online orders. Their principal job activities involved walking throughout the warehouse with collection carts to retrieve products from inventory, and packing those items for distribution to Amazon.com customers. The screenings occurred off the warehouse floor—after Respondents had completed their tasks in the warehouse and clocked out for the day—and did not in any way affect the manner in which Respondents discharged their primary job duties.

Waiting in line for a security screening is indistinguishable from many other tasks that have been found non-compensable under the FLSA, such as waiting to punch in and out on the time clock, walking from the parking lot to the workplace, and

waiting to pick up protective gear before donning it for a work shift. *See* 29 C.F.R. § 790.7(f)-(g); *IBP*, 546 U.S. at 40-42. Indeed, time spent waiting to clear security is indistinguishable from time spent walking between the time clock and the work station that was at issue in *Mt. Clemens* and squarely addressed in the Portal-to-Portal Act.

Security screenings also bear little resemblance to the types of activities this Court has found to satisfy the "integral and indispensable" test. Each time this Court has found that test to be satisfied, there has been a direct link between the activity in question and employees' other principal duties. Butchers cannot cut meat properly without first sharpening their knives, *see King Packing*, 350 U.S. at 262-63, and workers cannot manufacture batteries in a safe manner without taking pre- and post-shift measures to prevent exposure to hazardous chemicals, *see Steiner*, 350 U.S. at 251.

Respondents, in contrast, can discharge all of their principal job functions in the customary manner regardless of whether they undergo a security screening after completing their work for the day. If Respondents had avoided the security screening by sneaking out a side door, they would have violated company policy but would have still fully discharged their primary job duties. And the "integral and indispensable" test must really mean what it says lest Congress' clear judgment in the Portal-to-Portal Act be disregarded. Congress drew a clear line between compensable principal duties and non-compensable preliminary and postliminary activities. Unless the pre- and post-shift activities

are so indispensable and integral to principal duties to *themselves* count as principal activities, they are non-compensable under the Portal-to-Portal Act.

II. The Ninth Circuit nonetheless held that Respondents could state a claim for relief under the FLSA for time spent waiting for and passing through post-shift security screenings. The court of appeals' core holding was that time spent in a security screening is compensable if it is "required" by the employer and performed for the employer's "benefit." Pet.App.11-12. That approach is wrong as a matter of law and proves far too much.

Under *Steiner*, the relevant question is whether an activity is so integral and indispensable to an employee's other principal job activities that it, too, counts as a principal activity. But that inquiry is very different from the Ninth Circuit's "required-and-beneficial" test. Many tasks that precede or follow the discharge of principal duties are "required" by an employer and performed for the employer's "benefit," but are not integral to an employee's job duties. For example, an employer may "require" its employees to be physically present at the work site each day—and the employer "benefits" from the presence of its employees—but this hardly makes walking from the parking lot to the work area a compensable activity. Similarly, punching the time clock (and waiting in line to punch the clock) has long been treated as non-compensable even though this task is "required" by employers and done for their benefit. Since the Portal-to-Portal Act was enacted, this Court has consistently rejected a test of simple necessity such as the one employed in *Mt. Clemens*, emphasizing

that "the fact that certain preshift activities are necessary for employees to engage in their principal activities *does not mean* that those preshift activities are 'integral and indispensable' to a 'principal activity' under *Steiner*." *IBP*, 546 U.S. at 40-41 (emphasis added).

The Ninth Circuit's approach essentially replicates this Court's initial effort at interpreting the FLSA, which Congress expressly discarded in the Portal-to-Portal Act. In *Mt. Clemens*, this Court found activities such as walking to a workstation after clocking in to be compensable because such tasks are "under the complete control of the employer" and "[w]ithout such [tasks] on the part of the employees, the productive aims of the employer could not have been achieved." 328 U.S. at 691-92. Congress rejected that interpretation of compensable activities when it enacted the Portal-to-Portal Act, yet the Ninth Circuit essentially resurrected the *Mt. Clemens* approach while purporting to interpret the law that abrogated it.

The Ninth Circuit fares no better in suggesting that security screenings are compensable because they "stem[] from the nature of the employees' work (specifically, their access to merchandise)." Pet.App.12. That is not the test under the Portal-to-Portal Act and this Court's precedents. Rides from the parking lot to the working area of a coal mine surely stem from the nature of the work, but that does not make them compensable. What matters under this Court's precedents is not whether a task "stems" from the "nature" of an employee's job, but whether the task is integral and indispensable to the

employee's *productive work*. Respondents' principal job activities involved processing and filling customer orders, not some amorphous "access to merchandise." For the same reason, the Court should reject Respondents' astonishing assertion that the security screenings were integral and indispensable to their job duty of "not stealing." Needless to say, no court has ever held that "not breaking the law" is a principal job activity for which compensation must be paid.

III. In the wake of *Mt. Clemens*, Congress restored a balanced approach in which employees' core productive activities would be subject to the FLSA, while preliminary and postliminary activities would be addressed, if at all, through voluntary agreements between employers and employees. That is, preliminary and postliminary activities would simply be one factor that employees consider in deciding whether to take a particular job, and it would be up to employers and employees to choose how to address those issues.

The Ninth Circuit's decision fundamentally upsets that balance by requiring mandatory compensation under the FLSA for quintessential postliminary activities. Unsurprisingly, like *Mt. Clemens* itself, the Ninth Circuit's decision has resulted in numerous class-action suits against major employers as plaintiffs' attorneys seek to capitalize on a novel and expansive interpretation of compensable activities. If such a dramatic change is to be made in what had been a settled area of the law, it should be made via legislation that applies on a prospective basis only. One thing Congress made

crystal clear in the Portal-to-Portal Act is that sweeping changes to the employer-employee relationship should not be made retroactively by the courts based on expansive and atextual interpretations of the FLSA.

ARGUMENT

I. Respondents Cannot State A Claim Under The FLSA For Time Spent Waiting For A Security Screening.

A. Waiting in Line for a Security Screening is a Quintessential Example of a Non-Compensable Preliminary or Postliminary Activity.

1. Congress enacted the Portal-to-Portal Act in 1947 to repudiate expansive judicial interpretations of the FLSA under which employees could recover back pay and double damages for activities that occurred before or after the employees discharged their actual job duties. *See* 29 U.S.C. § 251. In *Mt. Clemens*, this Court adopted a sweeping and simple view of the compensable workweek, namely that "the statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises." 328 U.S. at 690-91. That is, the Court held that the FLSA applied to any and all activities that were "'controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.'" *Id.* at 691 (quoting *Tennessee Coal*, 321 U.S. at 598).

Congress swiftly and emphatically rejected that approach, finding that *Mt. Clemens* had resulted in "wholly unexpected liabilities, immense in amount and retroactive in operation," that threatened to

"give rise to great difficulties in the sound and orderly conduct of business and industry." 29 U.S.C. § 251(a). The Portal-to-Portal Act accordingly excludes two broad categories of activities from the FLSA's compensation requirements: (1) "walking, riding, or traveling to and from the actual place of performance of the principal activity"; and (2) "activities which are preliminary to or postliminary to [the employee's] principal activity or activities." *Id.* § 254(a).

The clear import of the Portal-to-Portal Act is that an activity that is preliminary or postliminary to an employee's principal activities is non-compensable even if it is done on the employer's premises, at the employer's behest, and for the employer's benefit. Paradigmatic examples of non-compensable preliminary and postliminary activities are those at issue in the *Mt. Clemens* case, such as the time spent walking between the time clock and the employee's primary workstation. *See* 328 U.S. at 691.

Any construction of the Portal-to-Portal Act must distinguish between non-compensable "preliminary" and "postliminary" activities and compensable "principal activities," even though those key terms are not defined. In drawing that distinction, this Court has held that an activity is compensable only if it is an "integral and indispensable part of the principal activities for which covered workmen are employed." *Steiner*, 350 U.S. at 256. An employee's "principal activities," in turn, include "*work of consequence* performed for an employer" and activities that are "'indispensable to the performance of *productive work*.'" 29 C.F.R. § 790.8(a) (emphasis

added); *see IBP*, 546 U.S. at 36 ("[I]n most situations the workday will be defined by the beginning and ending of the primary productive activity.").[3]

To ensure that Congress' judgment that preliminary and postliminary activities are non-compensable is not disregarded, the "integral and indispensable" test must be applied strictly. Only those activities so integral and indispensable to the balance of employees' principal activities to be counted as principal activities in their own right are compensable. For example, in *Steiner*, this Court affirmed the district court's conclusion that an activity is compensable if it is "'so closely related to other duties performed by [petitioners'] employees as to be an integral part thereof and [is], *therefore, included among the principal activities of said employees*.'" 350 U.S. at 252 (emphasis added). And in *IBP*, the Court reiterated that tasks that are integral and indispensable to principal activities "are themselves 'principal activities.'" 546 U.S. at 33. There is no "third category of activities ... that are 'integral and indispensable' to a 'principal activity' ... but that are not themselves 'principal activities.'" *Id.*

Strict adherence to the "integral and indispensable" test is necessary to render *Steiner* consistent with the Portal-to-Portal Act. The Act provides that the FLSA's compensation mandates do not apply to *any* preliminary or postliminary activities, and thus activities that are compensable

---

[3] *See also Adair v. ConAgra Foods*, 728 F.3d 849, 852 (8th Cir. 2013) ("[I]f the employee is not 'employed to perform' a particular activity, even if that activity may be basic to the employee's work, then it is not a principal activity.").

under *Steiner* must be understood as so integral and indispensable to other principal activities that they should be treated as principal activities in their own right.

2. Pre- or post-shift security screenings do not remotely satisfy the "integral and indispensable" test and, indeed, are the "*modern paradigms* of the preliminary and postliminary activities described in the Portal-to-Portal Act." *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 593 (2d Cir. 2007) (emphasis added). Here, Respondents worked for Integrity as "warehouse employees," and their principal activities involved "fulfill[ing] orders made by Amazon.com customers." First Amended Complaint ¶ 13 (JA 20). To fill customer orders, Respondents "walked throughout their respective warehouse facilities with collection carts and retrieved products from the shelf and directed the product to be distributed to Amazon.com customers." *Id.* Those tasks are the "productive work" and "work of consequence," *see* 29 C.F.R. § 790.8(a), for which Respondents were employed.

Security screenings were neither "integral" nor "indispensable" to Respondents' principal activities of filling customer orders. The screenings occurred off the warehouse floor, after Respondents had completed their productive work and punched out for the day. *Id.* ¶ 16 (JA 21-22). And those screenings did not in any way affect *how* Respondents discharged their duties of filling customer orders. Respondents could retrieve items from inventory and process customer orders in the usual manner regardless of whether they went through a post-shift

security screening on their way out of the building after work. An employee who punched out and left via an unsupervised side exit may have violated company policy but still would have completed his primary activities.

The legislative history of the Portal-to-Portal Act supports treating security screenings as non-compensable. During the floor debates, Senator Cooper—one of the chief sponsors of the Act—emphasized that an activity such as changing clothes would be compensable only "if the employee *could not perform his* [*principal*] *activity*" without it. 93 Cong. Rec. 2297-98 (emphasis added) (quoted in *Steiner*, 350 U.S. at 258). In contrast, if the activity were "not directly related to the specific work, it would not be considered a part of [the employee's] principal activity, and it follows that such time would not be compensable." *Id.* Security screenings plainly fall into the latter category, as Respondents could unquestionably perform all of their principal activities regardless of whether they underwent a post-shift security screening.

The legislative history also makes clear beyond cavil that the Portal-to-Portal Act was enacted to abrogate the results in cases like *Mt. Clemens* that had extended the scope of the compensable workweek beyond Congress' initial conception. *See, e.g.*, S. Rep. No. 80-37, at 12 ("If the doctrine enunciated by the Supreme Court of the United States in the *Mount Clemens* case is ultimately sustained, the likelihood is that ... the country will be involved in a flood of litigation, the extent of which it is impossible to estimate."). Thus, the preliminary and postliminary

activities deemed compensable in *Mt. Clemens* clearly inform the scope of the Portal-to-Portal Act. While *Mt. Clemens* viewed time spent walking between the time clock and the workstation as compensable, Congress just as clearly viewed such time as a non-compensable preliminary activity.

DOL's contemporaneously promulgated regulations confirm that same understanding. Since 1947, DOL's regulations have made clear that "checking in and out and waiting in line to do so," and "waiting in line to receive pay checks" are typically not compensable under the FLSA. 29 C.F.R. § 790.7(g).[4] These regulations "indicate[] that a reasonable amount of waiting time is intended to be preliminary or postliminary." *Tum v. Barber Foods*, 360 F.3d 274, 282 (1st Cir. 2004), *aff'd in relevant part sub nom. IBP*, 546 U.S. at 40-42.

Time spent waiting to clear security after clocking out is just the modern equivalent of such quintessentially non-compensable time. Both punching the clock and passing through a security screening are required by the employer and provide verifications that primarily benefit the employer. Both activities may require employees to wait in line, since—especially at a large work site with uniform shift changes—not all workers can punch the clock or go through a security screening simultaneously. And, most critically for purposes of the Portal-to-Portal Act, both activities are fundamentally distinct from the *productive work* employees are hired to

---

[4] Indeed, even *Mt. Clemens* found that time spent waiting to punch in (which could take up to 8 minutes each day) was non-compensable. 328 U.S. at 683, 689-90.

perform. There is no legally significant difference between waiting in line for a post-shift security screening and waiting in line to punch the time clock, which DOL itself has long treated as a non-compensable activity.

3. Security screenings are also far afield from the types of activities this Court has found to satisfy the "integral and indispensable" test.

In *King Packing*, 350 U.S. 260, the Court held that butchers' pre-shift knife-sharpening was a compensable activity. As the Court explained, "[a]ll of the knives as well as the saws must be 'razor sharp' *for the proper performance of the work*." *Id.* at 262 (emphasis added). A dull knife would simply not cut properly; it would "slow down production," "affect the appearance of the meat," "cause waste," and "make for accidents." *Id.* A worker who skipped this knife-sharpening step could not properly discharge his primary activities. This Court accordingly concluded that "the knife-sharpening activities of these workmen are an integral part of and indispensable to the various butchering activities for which they were principally employed." *Id.* at 263.

Similarly, in *Steiner*, the Court held that showering and changing clothes were integral and indispensable to the principal activities of battery-plant workers who were exposed to hazardous materials as part of their jobs. The employees worked with highly toxic chemicals, and if they did not take a post-work shower or bath, "lead oxide might be absorbed into the blood stream." 350 U.S. at 251. The company also provided each employee with a change of clothes because the chemicals used

at the plant "cause[d] such rapid deterioration that the clothes sometimes last[ed] only a few days." *Id.* Indeed, even the employer conceded that "the clothes-changing and showering activities of the employees are indispensable to the performance of their productive work and integrally related thereto." *Id.* Because showering and changing clothes were essential to "protect[ing] the company and the employee both," the Court concluded that "it would be difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of the principal activity of the employment." *Id.* at 251, 256.

In both *King Packing* and *Steiner*, the activities this Court found to satisfy the "integral and indispensable" test were critical to the *manner* in which employees performed their principal job duties. They were steps in performing the primary activities that could not be skipped if the work was to be done right. Butchers cannot properly cut meat with dull knives. And workers cannot produce batteries without taking appropriate precautions to protect themselves from exposure to the hazardous chemicals that are used in the manufacturing process. In both situations, the activity at issue was truly integral and indispensable to the employee's actual *job duties*.

Security screenings, in contrast, are far more analogous to the activities this Court found to be non-compensable in *IBP v. Alvarez*. In *IBP*, this Court drew a clear line between time spent donning indispensable safety gear and time spent *waiting* to receive that protective equipment. The donning of

specialized protective gear is integral to the principal job activities of a slaughterhouse worker because—like the activities in *King Packing* and *Steiner*—such donning is "*always* essential if the worker is to do his job." 546 U.S. at 40.[5] In contrast, time spent *waiting* to don protective equipment before the beginning of a shift—*e.g.*, time spent obtaining the protective clothing and signing it out—"always comfortably qualif[ies]" as a non-compensable activity because it precedes any primary activity and is "*two steps removed from the productive activity* on the assembly line." *Id.* at 40, 42 (emphasis added).

Just so here. A security screening that occurs *after* a worker has filled his or her last order of the day is several steps removed from the employee's productive work on the warehouse floor. For purposes of the FLSA and Portal-to-Portal Act, there is no meaningful difference between "waiting to don" safety gear, *id.* at 40, and "waiting for and undergoing [] daily security clearances" after the completion of work, *see* First Amended Complaint ¶ 17 (JA 22). Like the waiting time in *IBP* (and the walking time in *Mt. Clemens*), the post-shift security screenings are far removed from Respondents' productive work activities and are neither integral nor indispensable to the performance of that work.

---

[5] The employer in *IBP* did not dispute the district court's finding that, "in light of *Steiner*, the donning and doffing of unique protective gear are 'principal activities' under [] the Portal-to-Portal Act." 546 U.S. at 523.

B. Other Than the Decision Below, Every Court To Consider This Issue Has Correctly Held That Security Screenings Are Not Compensable Under the FLSA.

Applying the straightforward principles discussed above, every court to consider this issue—other than the Ninth Circuit here—has held that time spent waiting for and passing through security screenings is not compensable under the FLSA.

The Second Circuit held in *Gorman* that time spent by nuclear-plant employees in "ingress and egress security procedures" was not compensable. 488 F.3d at 593-94. The employees in *Gorman* went through an extensive screening process on the way into the plant, including "waiting in line and passing through a radiation detector, x-ray machine, and explosive material detector." *Id.* at 592. On the way out of the plant, workers did "many of these things in reverse," and also underwent a "more sensitive" "egress radiation-test." *Id.* at 592 & n.2. The Second Circuit acknowledged that these activities were "necessary in the sense that they are required and serve essential purposes of security," but nonetheless concluded that they were "not integral to principal work activities." *Id.* at 593.

The court emphasized that "security-related activities" are "modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act." *Id.* As the court explained, security screenings are far afield from the types of indispensable and integral activities that have been found compensable under the FLSA, such as a

butcher sharpening knives and an x-ray technician powering up and testing the machinery. *Id.* at 592.[6]

Similarly, in *Bonilla v. Baker Concrete Construction*, 487 F.3d 1340 (11th Cir. 2007), the Eleventh Circuit held that "time spent going through security screening" was non-compensable under the FLSA. The plaintiffs there were construction workers who "were required to pass through a single security checkpoint" in order to "reach their work sites" at an airport facility. *Id.* at 1340-41. Like Respondents here, the plaintiffs argued that they were entitled to compensation for this time because the security screenings were "necessary" "in order to do their jobs." *Id.* at 1344.

Relying on *IBP* and *Steiner*, the Eleventh Circuit squarely rejected that argument. As the court explained, "[i]f mere causal necessity [were] sufficient to constitute a compensable activity, all commuting would be compensable because it is a practical necessity for all workers to travel from their homes to their jobs." *Id.* "If the Portal-to-Portal Act is to have any meaning at all, its terms cannot be swallowed by an all-inclusive definition of 'integral and indispensable.'" *Id.*

---

[6] The Second Circuit could posit only a single, narrow situation in which the FLSA might require compensation for time spent in a security screening: when the employee in question is "responsible for monitoring, testing, and reporting on the plant's infrastructure security." *Id.* at 593 n.5. Of course, if an employee were hired to oversee a plant's security measures, then security-related tasks would constitute his *principal activities* and would be compensable as such. *See* 29 C.F.R. § 790.8(a).

A number of federal district courts have likewise held that time spent in employer-mandated security screenings is non-compensable because such screenings are fundamentally distinct from employees' principal job duties. *See Sleiman v. DHL Express*, No. 09-414, 2009 WL 1152187, at *5-*6 (E.D. Pa. Apr. 27, 2009) ("security screening procedures do not constitute work, and are not integral and indispensable to principal activities," even if they are imposed by a private company); Mem. & Order at 6-7, *Jones v. Best Buy Co.*, No. 12-cv-95 (D. Minn. Apr. 12, 2012) (holding that "security screening time is not compensable under FLSA as a matter of law," even in the context of "employer-required security screening"); *Anderson v. Perdue Farms*, 604 F. Supp. 2d 1339, 1359 (M.D. Ala. 2009) (employees of a privately owned chicken plant were "not entitled to compensation for ... time spent clearing security"); *White v. Tip-Top Poultry*, No.07-0101, 2008 U.S. Dist. LEXIS 110598, at *32-33 n.5 (N.D. Ga. Oct. 7, 2008) (same).[7]

---

[7] *See also Whalen v. United States*, 93 Fed. Cl. 579, 600-01 (2010) (security checks were effectively "an extension of plaintiffs' commute" and were not integral or indispensable to their principal activities as air traffic controllers").

II. The Ninth Circuit Badly Misconstrued The Portal-to-Portal Act.

A. The Ninth Circuit's "Required-and-Beneficial" Test is Inconsistent With the Text and History of the Act, This Court's Precedents, and DOL's Regulations.

The Ninth Circuit badly misconstrued the "integral and indispensable" standard to reach its result that security screenings are compensable under the FLSA. The court's core holding was that Respondents can state a claim under the FLSA because Integrity "requires" the security screenings and the screenings are "done for Integrity's benefit." Pet.App.11-12. That interpretation of the Portal-to-Portal Act is profoundly flawed on a number of levels.

At the outset, the Ninth Circuit's approach is fundamentally inconsistent with both the text and evident purpose of the Portal-to-Portal Act. Congress was crystal clear that preliminary and postliminary activities were non-compensable. 29 U.S.C. § 254(a). The kind of preliminary and postliminary activities Congress had in mind were not solely activities done gratuitously by employees for their own benefit, but included those done at the employer's behest and for the employer's benefit. The test is not who requires the activity or who benefits. Instead, the question is whether the activities precede (or follow) the primary activities, or rather are so integral and indispensable to other primary activities as to count as primary activities in their own right. *See Steiner*, 350 U.S. at 252; *IBP*, 546 U.S. at 33.

In other words, the kind of preliminary and postliminary activities Congress had in mind were the kind of preliminary and postliminary activities this Court found compensable in *Mt. Clemens*, such as time walking between the time clock and the employee's primary work station. But those activities were certainly required by the employer and benefited the employer. Likewise the travel time in cases like *Jewell Ridge* and *Tennessee Coal* was required by the employer and benefited the employer. Yet Congress clearly acted to make that time non-compensable. Thus, the Ninth Circuit's "required by and benefit to the employer" test cannot be a proper interpretation of the Portal-to-Portal Act. *See Tum*, 360 F.3d at 285-86 (Boudin, C.J., concurring) (fact that certain tasks "are in the employer's service" was "equally true in the *Mt. Clemens* case and Congress made a policy decision against required compensation").

Thus, like the argument this Court rejected in *IBP*, the Ninth Circuit's approach produces the "logical (but untenable) conclusion" that many of the activities found compensable in *Mt. Clemens* were "unaffected by the Portal-to-Portal Act." *IBP*, 546 U.S. at 41. For example, "walking from a timeclock near the factory gate to a workstation is certainly necessary for employees to begin their work, but it is indisputable that the Portal-to-Portal Act evinces Congress' intent to repudiate [*Mt. Clemens*'] holding that such walking time was compensable under the FLSA." *Id.* at 41.

Indeed, the Ninth Circuit's approach in this case is the modern analog to the *Mt. Clemens* decision

that Congress expressly abrogated in the Portal-to-Portal Act. In *Mt. Clemens*, this Court held that employees were entitled to compensation under the FLSA for "all time during which an employee is *necessarily required* to be on the employer's premises, on duty or at a prescribed workplace." 328 U.S. at 690-91 (emphasis added). The Court reasoned that activities such as walking to and from employee workstations was compensable because these tasks were "under the complete control of the employer" and "[w]ithout such [tasks] on the part of the employees, the productive aims of the employer could not have been achieved." *Id.* at 691-92.

The Ninth Circuit has thus managed to adopt essentially the same test that carried the day in *Mt. Clemens*. "The déjà vu is enough to make one swoon." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 900 (2009) (Roberts, C.J., dissenting). While this Court's initial interpretation of undefined terms in *Mt. Clemens* was perfectly understandable, the Ninth Circuit's resurrection of that test is inexplicable. The express purpose of the Portal-to-Portal Act was to overthrow the *ancien regime*, including *Mt. Clemens*. Any interpretation of the Act that resurrects the very decision that the Act abrogated cannot possibly be correct.[8]

---

[8] Like *Mt. Clemens*, the Ninth Circuit also suggested that its expansive interpretation of compensable activities would be ameliorated by application of a *de minimis* doctrine. *Compare* Pet.App.16 (noting existence of "*de minimis* exception" for time spent in security screening) *with Mt. Clemens*, 328 U.S. at 692 ("[w]e do not, of course, preclude the application of a *de minimis* rule where the ... time is such as to be negligible"). The Portal-to-Portal Act clearly rejects the notion that a barely adumbrated

For similar reasons, the Ninth Circuit's analysis is not a faithful application of this Court's longstanding test from *Steiner*. Under *Steiner*, activities are compensable only if they are "an integral and indispensable part of the *principal activities for which covered workmen are employed*." 350 U.S. at 256 (emphasis added). Consistent with the express purpose of the Portal-to-Portal Act, the *Steiner* test ensures that the FLSA will apply only to activities that are part and parcel of employees' productive work.

The Ninth Circuit's "required-and-beneficial" approach is far broader than the *Steiner* test. Numerous quintessential preliminary or postliminary activities are "required" or "necessary" in a broad, but-for sense in that the employer will not hire someone who does not perform these tasks. Integrity "requires" all of its warehouse workers to travel from their homes to the job site each day, walk from the parking lot to the warehouse, and punch in and out on the time clock; an employee who fails to perform these tasks would be terminated. But all of those activities are unquestionably non-compensable. *See* 29 C.F.R. § 790.7(f)-(g). Whether an activity is "required" by the employer at a high level of generality—and whether the employer "benefits" from that activity to some extent—is a very different inquiry from whether the task is integral and indispensable to an employee's *principal job duties*.

---

de minimis exception is sufficient to rein in an overbroad definition of the relevant "workweek."

This Court has expressly held that the Portal-to-Portal Act requires more than simple necessity for an activity to be compensable. As the Court explained, "the fact that certain preshift activities are necessary for employees to engage in their principal activities *does not mean* that those preshift activities are 'integral and indispensable' to a 'principal activity' under *Steiner*." *IBP*, 546 U.S. at 40-41 (emphasis added). The Court concluded that "time spent waiting to don" protective gear before a shift begins "comfortably qualif[ies]" as a non-compensable preliminary activity, even though employees necessarily had to complete this task in order to perform their jobs. *Id.* at 40; *see also Bonilla*, 487 F.3d at 1344 ("[i]f mere causal necessity was sufficient to constitute a compensable activity, all commuting would be compensable because it is a practical necessity for all workers to travel from their homes to their jobs").

The Ninth Circuit's interpretation of the Portal-to-Portal Act also conflicts with DOL's regulations. Countless employers "require" hourly employees to punch in and out on a time clock, which may also entail waiting in line for several minutes. And this task is unquestionably done for the "benefit" of the employer, to ensure accurate recordkeeping and prevent cheating. But, as noted above, it is well-established under DOL's regulations that "checking in and out and waiting in line to do so" is not compensable because such tasks are not integral or

indispensable to the employee's actual *job duties*. 29 C.F.R. § 790.7(g).[9]

The district court found DOL's regulation to be directly applicable here, noting that security screenings "fall squarely into a non-compensable category of postliminary activities such as checking in and out and waiting in line to do so and 'waiting in line to receive pay checks.'" Pet.App.27-28 (quoting 29 C.F.R. § 790.7(g)); *see also IBP*, 546 U.S. at 41 (relying on § 790.7(g) in finding time waiting to don non-compensable). Yet, remarkably, the Ninth Circuit did not even cite this regulation, much less offer a principled reason for distinguishing between time spent waiting in line for a security screening and time spent waiting in line to punch the clock at the beginning or end of the day.

B. The Ninth Circuit and Respondents Define the Relevant "Principal Activities" Far Too Broadly.

The Ninth Circuit also suggested in passing that the security screenings were compensable under the FLSA because they "stem[] from the nature of the employees' work (specifically, their access to merchandise)." Pet.App.12. That holding, too, is unprecedented and wrong for several reasons.

First, the Ninth Circuit was wrong to suggest that "access to merchandise" was one of Respondents'

---

[9] Similarly, time spent walking from the parking lot or factory gate to the employee's work station is certainly "required" for an employee to be able to perform her job, but DOL has long recognized that such activities are not compensable. *See* 29 C.F.R. § 790.7(f).

principal job duties. The principal activities for which an employee must be compensated include "work of consequence" performed for the employer and activities that are "indispensable to the performance of productive work." 29 C.F.R. § 790.8(a). Here, Respondents' "work of consequence" and "productive work" involved *filling customer orders*, not some abstract and amorphous "access to merchandise." Integrity did not pay Respondents to have access to merchandise; it paid them to retrieve items from inventory and package those items for distribution to Amazon.com customers.

In all events, the Ninth Circuit's reasoning proves far too much, as many quintessentially non-compensable activities "stem[] from the nature of the employees' work." For example, the fact that coal miners had to spend substantial periods of time traveling from the parking lot to the work site certainly stemmed from the nature of the work, but that time is clearly non-compensable under the Portal-to-Portal Act. Access to the mine, like "access to merchandise" may be necessary for the performance of the miner's principal activities, but those activities are mining, not access to the mine in the abstract. What matters is not whether the activity merely stems from the "nature" of the employee's work—a test seemingly designed to impermissibly capture activities that flow from, but are only tangentially related to, the employees' principal activities—but whether it is "integral and indispensable to the employees' principal *productive work*.

Respondents go even farther than the Ninth Circuit, arguing that post-shift security screenings are integral and indispensable to the job duty of "refrain[ing] from putting in their pockets ... merchandise to take home at the end of the day." BIO 19-20; *see also* First Amended Complaint ¶ 15 (JA 21) ("it is an essential part of the job of a warehouse worker that they not take items from the warehouse out of the warehouse").

That assertion is stunning. No court, including the Ninth Circuit below, has endorsed the notion that "not stealing" counts as a principal job activity. Employees have an obligation not to steal because it is against the law, not because it is one of the duties they are paid to perform. Refraining from committing a crime is a society-wide obligation, not part of an employee's "productive work" or "work of consequence" for purposes of the FLSA. 29 C.F.R. § 790.8(a). Unsurprisingly, Respondents cite no authority in support of their contention that "not breaking the law" should be treated as a principal job activity.

C. The Number of Employees Screened Is Legally Irrelevant.

Finally, the Ninth Circuit attempted to distinguish cases such as *Gorman* and *Bonilla* finding security screenings to be non-compensable on the ground that, in those cases, "everyone who entered the workplace had to pass through a security clearance." Pet.App.12. That is, the Ninth Circuit suggested that the security screenings at issue here applied to some, but not all, Integrity employees. Respondents similarly contend that the screenings

were applied in a selective or inconsistent manner, and that employees such as "bookkeepers" would not be screened. BIO 15-16.

Tellingly, neither the Ninth Circuit nor the Respondents cite *anything* in support of their suggestion that only certain employees are subject to security screenings. Respondents are the masters of their complaint, and it is their responsibility to include in the complaint plausible allegations showing that they are entitled to relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). But Respondents' complaint contains absolutely no allegations suggesting that the screenings were applied in a selective manner or that certain employees at an Amazon.com warehouse would not be screened as they exited the facility.

In reality, although there is no record evidence (or allegation) at this point in the litigation, the general practice is that everyone entering a secured work or service area—including employees, vendors, contractors, and visitors—is required to clear security on the way out of the building, even if they were only visiting administrative offices. That underscores that while the security screening is related to potential access to the merchandise floor, it does not thereby become an integral and indispensable part of the primary work activities of everyone with "access to merchandise."

In all events, the question in any case involving a preliminary or postliminary activity is whether the activity is integral and indispensable to the principal job duties *of the employees in question*. Whether that activity is also performed by other employees with

different job duties sheds little light on that inquiry. If a company required its factory workers, but not its bookkeepers, to punch in and out on a time clock each day, this would hardly transform punching the clock into an integral and indispensable activity for the factory workers.

Moreover, if non-universal security screenings are more likely to be compensable under the FLSA—as Respondents and the Ninth Circuit contend—this will create a perverse incentive for employers to screen *everyone*. It cannot possibly be right that an otherwise-compensable activity can become non-compensable simply because *more* employees are required to do it. Such a rule would disserve both employers and employees, and would hardly advance the purposes of the FLSA.

For largely the same reasons, the Ninth Circuit was wrong to find support for its holding in the fact that "employees apparently pass through the clearances only on their way out of work, not when they enter." Pet.App.11. Security screenings are quintessential examples of non-compensable activities *regardless* of whether they are conducted upon ingress, egress, or both. *See Gorman*, 488 F.3d 593-94 (time spent in ingress *and egress* security procedures was non-compensable). An activity is either compensable or it is not, and each task must be evaluated in its own right. Again, it would make no sense to craft a legal regime in which an employer can avoid paying compensation for *any* security

screenings as long as it requires two screenings, but must compensate if it requires only one.[10]

III. The Ninth Circuit's Decision Upends The Carefully Crafted Regulatory Regime Embodied In The FLSA And Portal-to-Portal Act.

A. In the post-9/11 world, security screenings have become ubiquitous in the American workplace, and are routinely required for employees working in skyscrapers, corporate campuses, federal, state, and local government offices, courthouses, high schools, sports arenas, museums, medical laboratories, airports, power plants, and countless other places. These screenings take a variety of different forms. Some are mandatory for all persons entering a building, while others might involve only random checks. Some apply only upon entering a building, while others apply on both entry and exit, *see Gorman*, 488 F.3d at 592, or exit only. Some involve walking through a metal detector while others might

---

[10] Nor is there any basis for drawing a line between government-mandated security screenings and employer-mandated security screenings, as the Ninth Circuit suggested in passing. Pet.App.12. Regardless of who imposed the screening, the relevant question is whether it is integral and indispensable to the principal activities of the employee in question. It would make no sense for time spent time spent in a security screening to be compensable for a worker in an Amazon.com warehouse but non-compensable for a worker performing identical functions at a cargo warehouse on airport grounds. *See, e.g., Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2173 (2012) (rejecting interpretation of FLSA that would result in different outcomes for workers who "function identically" in all relevant respects).

involve a "bag check." Some are primarily about keeping dangerous items out, while others are primarily about keeping valuable materials in.[11] And these screenings serve a variety of purposes, from preventing theft, terrorism, or workplace violence, to safeguarding trade secrets and intellectual property.

Before the Ninth Circuit's decision, the existence (and nature) of a security screening process was just one factor among many that employees would consider in choosing whether to take a particular job. Prospective employees would simply weigh that consideration against other factors—such as pay, benefits, work schedule, distance from home, and opportunities for advancement—in deciding whether to take the position. A retail store located past the security checkpoint in an airport, or in the retail area of a government building, would presumably need to offer higher pay or other perks to offset the inconvenience to employees of having to go through security each day; failing to do so would make it harder to attract and retain good employees.

Indeed, any number of legitimate business decisions can result in minor day-to-day inconveniences for employees. For example, employees might face an unusually long commute if their employer is located in a high-traffic downtown area or a remote rural area. Similarly, if a company

---

[11] For example, to prevent the loss of rare and valuable books, Harvard's Widener and Lamont Libraries have a longstanding policy that "all users' bags, briefcases, portfolios, backpacks, purses, books, library materials, and drawing tubes are inspected as users exit the libraries." *See* Harvard Coll. Library, *Admittance* (2014), http://hcl.harvard.edu/info/admittance.

has offices on the 50th floor of a skyscraper, its employees will likely spend significant time on or waiting for elevators at the beginning and end of each workday. Or a factory might have a very large parking lot that requires employees to walk for 10 minutes each way between their cars and their work stations. Each of these situations may result in minor inconveniences for employees, but these are not the types of issues that are subject to mandatory, government-imposed compensation under the FLSA. Instead, these are simply factors that employees must weigh and consider in choosing whether to take a particular job.

In the Portal-to-Portal Act, Congress left it to employers and employees to determine what, if any, compensation will be paid for preliminary and postliminary activities. The Act expressly recognizes that the default rule—that preliminary and postliminary activities are not compensable—may be altered through "an express provision of a written or nonwritten contract ... between [an] employee, his agent, or collective-bargaining representative and his employer." 29 U.S.C. § 254(b). As Justices Frankfurter and Burton noted in their dissent in *Mt. Clemens*, the "obvious, long established, and simple way" to compensate employees for preliminary and postliminary activities "is to recognize those activities *in the rate of pay* for the particular job." 328 U.S. at 697 (emphasis added).

In short, the "consequence of dispensing with the intricate exercise of separating the minutes spent" on preliminary or postliminary activities "is not to prevent compensation for the uncovered segments,

but merely to leave the issue of compensation" to employers and employees. *Sandifer*, 134 S. Ct. at 880-81.[12] The Ninth Circuit's decision upends the careful policy balance struck by Congress in the FLSA and Portal-to-Portal Act, and converts what had been a balanced regulatory scheme into a litigation windfall for employees and their lawyers.

B. Predictably, the aftermath of the Ninth Circuit's decision in this case has resembled the fallout from the *Mt. Clemens* decision. In the wake of *Mt. Clemens*, the courts were flooded with claims by employees seeking billions of dollars of back pay and liquidated damages under the FLSA for preliminary and postliminary tasks that had nothing to do with their actual job duties. Just six months later, Congress enacted the Portal-to-Portal Act to repudiate that decision, finding that the FLSA, as construed in *Mt. Clemens*, had resulted in "wholly unexpected liabilities, immense in amount and retroactive in operation," that threatened to "give rise to great difficulties in the sound and orderly conduct of business and industry." 29 U.S.C. § 251(a).

The Ninth Circuit's decision in this case has *already* had a similar effect, spawning a number of nationwide class-action suits that seek to hold employers retroactively liable for back pay, overtime, and double damages for time spent in security screenings. Amazon.com and its staffing companies

---

[12] *See also Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 218 (4th Cir. 2009) (Wilkinson, J.) (mandatory compensation for preliminary and postliminary activities "could preclude [] flexible and mutually preferable agreements").

are now defendants in at least 13 class-action suits across the country (including one filed just four weeks ago).[13] For those defendants *alone*, the putative class includes more than 400,000 plaintiffs, and Respondents' counsel has boasted that "'we're talking hundreds of millions of dollars'" in damages.[14] Nationwide class-action suits have also been filed against several other major employers, including Apple, *see* Class Action Complaint ¶ 51-60, *Frlekin v. Apple Inc.*, No. 3:13-cv-3451 (N.D. Cal. July 25, 2013), and CVS Pharmacy, *see* First Amended Class Action Complaint ¶¶ 14-20, 65-73, *Ceja-Corona v. CVS*, No. 1:12-cv-1868 (E.D. Cal. July 15, 2013).

Like the *Mt. Clemens* decision, "the very fact that suits were filed in such great numbers, not before, but subsequent to the decision ... indicates very clearly the fact that the activities for which the Court was awarding compensation were such as had not been deemed by either management or employees to be compensable." 93 Cong. Rec. 2089-90 (1947) (statement of Sen. Donnell). Indeed, it is telling that, in the Portal-to-Portal Act's first sixty-five years on

---

[13] *See, e.g.*, Collective Action Complaint, *Johnson v. Amazon.com DEDC, LLC*, No. 3:14-1797 (D.S.C. May 2, 2014); Class Action Complaint, *Vance v. Amazon.com*, No. 3:13-cv-765 (W.D. Ky. Aug. 1, 2013); Class Action & FLSA Collective Action Complaint, *Allison v. Amazon.com*, No. 2:13-cv-1612 (W.D. Wash. Sept. 6, 2013); Collective Action & Class Action Complaint, *Johnson v. Amazon.com*, No. 1:13-cv-153 (W.D. Ky. Sept. 17, 2013).

[14] Aaron Kase, *Amazon Workers Want Pay for Time Spent at Security Checkpoint*, Lawyers.com (Apr. 25, 2013), http://blogs.lawyers.com/2013/04/amazon-workers-want-pay-for-time-at-security/.

the books, no court, until the Ninth Circuit here, had found security-related activities to be compensable.

And if there really is a need to change the law, it should be done on a prospective basis in a manner that provides fair notice to employers, not by "impos[ing] potentially massive liability" retroactively for conduct that has never been understood to violate the FLSA. *Christopher*, 132 S. Ct. at 2167. It may be "possible for an entire industry to be in violation of the [FLSA] for a long time" without anyone noticing, but the "more plausible hypothesis" is that the industry "has been left alone because the character of its compensation system" is not unlawful. *Yi v. Sterling Collision Centers*, 480 F.3d 505, 510 (7th Cir. 2007); *accord Christopher*, 132 S. Ct. at 2168.

In all events, the history of the Portal-to-Portal Act makes crystal clear that sweeping changes to workplace compensation rules should not be made retroactively by the courts based on expansive and atextual interpretations of the FLSA.[15] If there is to be a major change in the types of activities that are covered by the FLSA, it should be made on a *prospective* basis through legislation, not through backward-looking litigation that seeks to hold companies liable for billions of dollars of back pay and double damages.

---

[15] Notably, the Secretary of Labor learned this lesson of the Portal-to-Portal Act, as both *Steiner* and *King Packing* involved enforcement actions that sought only *prospective* relief. *See Steiner*, 350 U.S. at 332 ("[t]here is no question of back pay involved here"); *King Packing*, 350 U.S. at 260 (DOL sought "an injunction to enforce compliance with the Act").

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

NEIL M. ALEXANDER
RICK D. ROSKELLEY
ROGER L. GRANDGENETT II
CORY GLEN WALKER
LITTLER MENDELSON
3960 Howard Hughes
Parkway, Suite 300
Las Vegas, NV 89169
(702) 862-8800

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
BARBARA A. SMITH
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

May 28, 2014

STATUTORY APPENDIX

TABLE OF CONTENTS

29 U.S.C. § 251 ..... 1a
29 U.S.C. § 254 ..... 4a
29 C.F.R. § 790.7 ..... 7a
29 C.F.R. § 790.8 ..... 14a

29 U.S.C. § 251

Congressional findings and declaration of policy

(a) The Congress finds that the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged

in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this chapter be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts 1 and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this chapter shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

(b) It is declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

29 U.S.C. § 254

Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation

(a) Activities not compensable

Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel

is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

(b) Compensability by contract or custom

Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to any activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) Restriction on activities compensable under contract or custom

For the purposes of subsection (b) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) Determination of time employed with respect to activities

In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

29 C.F.R. § 790.7

"Preliminary" and "postliminary" activities.

(a) Since section 4 of the Portal Act applies only to situations where employees engage in "preliminary" or "postliminary" activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked. If such time would otherwise be counted as time worked under the Fair Labor Standards Act, section 4 may not change the situation. Whether such time must be counted or may be disregarded, and whether the relief from liability or punishment afforded by section 4 of the Portal Act is available to the employer in such a situation will depend on the compensability of the activity under contract, custom, or practice within the meaning of that section.[40] On the other hand, the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not "preliminary" or "postliminary" activities outside the workday.[41] And even where there is a

---

[40] See Conference Report. pp. 10, 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2178-2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298. See also §§ 790.4 and 790.5.

[41] See Conference Report, p. 12; Senate Report, pp. 47, 48; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Representative Gwynne, explaining the conference agreement

contract, custom, or practice to pay for time spent in such a "preliminary" or "postliminary" activity, section 4(d) of the Portal Act does not make such time hours worked under the Fair Labor Standards Act, if it would not be so counted under the latter Act alone.[42]

(b) The words "preliminary activity" mean an activity engaged in by an employee before the commencement of his "principal" activity or activities, and the words "postliminary activity" means an activity engaged in by an employee after the completion of his "principal" activity or activities. No categorical list of "preliminary" and "postliminary" activities except those named in the Act can be made, since activities which under one set of circumstances may be "preliminary" or "postliminary" activities, may under other conditions be "principal" activities. The following "preliminary" or "postliminary" activities are expressly mentioned in the Act: "Walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which (the) employee is employed to perform."[43]

(c) The statutory language and the legislative history indicate that the "walking, riding or traveling" to which section 4(a) refers is that which occurs, whether on or off the employer's premises, in

---

to the House of Representatives, 93 Cong. Rec. 4388. See also § 790.6.

[42] See § 790.5(a).

[43] Portal Act, subsections 4(a), 4(d). See also Conference Report, p. 13; statement of Senator Donnell, 93 Cong. Rec. 2181, 2362.

the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee's regular working hours.[44] For example, travel by a repairman from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of "walking, riding or traveling" described in section 4(a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel would not ordinarily be "walking, riding, or traveling" of the type referred to in section 4(a). One example would be a traveling employee whose duties require him to travel from town to town outside his regular working hours; another would be an employee who has gone home after completing his day's work but is subsequently called out at night to travel a substantial distance and perform an emergency job

---

[44] These conclusions are supported by the limitation, "to and from the actual place of performance of the principal activity or activities which (the) employee is employed to perform," which follows the term "walking, riding or traveling" in section 4(a), and by the additional limitation applicable to all "preliminary" and "postliminary" activities to the effect that the Act may affect them only if they occur "prior to" or "subsequent to" the workday. See, in this connection the statements of Senator Donnell, 93 Conf. Rec. 2121, 2181, 2182, 2363; statement of Senator Cooper, 93 Cong. Rec. 2297. See also Senate Report, pp. 47, 48.

for one of his employer's customers.[45] In situations such as these, where an employee's travel is not of the kind to which section 4(a) of the Portal Act refers, the question whether the travel time is to be counted as worktime under the Fair Labor Standards Act will continue to be determined by principles established under this Act, without reference to the Portal Act.[46]

(d) An employee who walks, rides or otherwise travels while performing active duties is not engaged in the activities described in section 4(a). An illustration of such travel would be the carrying by a logger of a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to the cutting area. In such a situation, the walking, riding, or traveling is not segreable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) and it does not constitute travel "to and from the actual place of performance" of the principal activities he is employed to perform.[47]

---

[45] The report of the Senate Judiciary Committee (p. 48) emphasized that this section of the Act "does not attempt to cover by specific language that many thousands of situations that do not readily fall within the pattern of the ordinary workday."

[46] These principles are discussed in part 785 of this chapter.

[47] Senator Cooper, after explaining that the "principal" activities referred to include activities which are an integral part of a "principal" activity (Senate Report, pp. 47, 48), that is, those which "are indispensable to the performance of the productive work," summarized this provision as it appeared in the Senate Bill by stating: "We have clearly eliminated from compensation walking, traveling, riding, and other activities

(e) The report of the Senate Committee on the Judiciary (p. 47) describes the travel affected by the statute as "Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out." The phrase, actual place of performance," as used in section 4(a), thus emphasizes that the ordinary travel at the beginning and end of the workday to which this section relates includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the performance of the principal activity or activities, and the return travel from that place at the end of the workday. However where an employee performs his principal activity at various places (common examples would be a telephone lineman, a "trouble-shooter" in a manufacturing plant, a meter reader, or an exterminator) the travel between those places is not travel of the nature described in this section, and the Portal Act has not significance in determining whether the travel time should be counted as time worked.

(f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1) walking or riding by an employee between the plant gate and the

---

which are not an integral part of the employment for which the worker is employer." 93 Cong. Rec. 2299.

employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.[48]

(g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.[49]

(h) As indicated above, an activity which is a "preliminary" or "postliminary" activity under one set of circumstances may be a principal activity under other conditions.[50] This may be illustrated by the following example: Waiting before the time established for the commencement of work would be

---

[48] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2121, 2182, 3263.

[49] See Senate Report p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity" See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298. See also paragraph (h) of this section and §790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

[50] See paragraph (b) of this section. See also footnote 49.

regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities.[51] The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged.[52]

---

[51] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2298.

[52] See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 7 WHR 1165.

29 C.F.R. § 790.8

"Principal" activities.

(a) An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the "principal" activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted.[53] But before it can be determined whether an activity is "preliminary or postliminary to (the) principal activity or activities" which the employee is employed to perform, it is generally necessary to determine what are such "principal" activities.[54]

The use by Congress of the plural form "activities" in the statute makes it clear that in order for an activity to be a "principal" activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job;[55] rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several "principal"

---

[53] See §§790.4 through 790.6 of this bulletin and part 785 of this chapter, which discusses the principles for determining hours worked under the Fair Labor Standards Act, as amended.

[54] Although certain "preliminary" and "postliminary" activities are expressly mentioned in the statute (see §790.7(b)), they are described with reference to the place where principal activities are performed. Even as to these activities, therefore, identification of certain other activities as "principal" activities is necessary.

[55] Cf. *Edward F. Allison Co., Inc.* v. *Commisstoner of Internal* Revenue, 63 F. (2d) 553 (C.C.A. 8, 1933).

activities during the workday. The "principal" activities referred to in the statute are activities which the employee is "employed to perform";[56] they do not include noncompensable "walking, riding, or traveling" of the type referred to in section 4 of the Act.[57] Several guides to determine what constitute "principal activities" was suggested in the legislative debates. One of the members of the conference committee stated to the House of Representatives that "the realities of industrial life," rather than arbitrary standards, "are intended to be applied in defining the term 'principal activity or activities'," and that these words should "be interpreted with due regard to generally established compensation practices in the particular industry and trade."[58] The legislative history further indicates that Congress intended the words "principal activities" to be construed liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed.[59] A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered

---

[56] Cf. *Armour & Co. v. Wantock,* 323 U.S. 126, 132-134: *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 136-137.

[57] See statement of Senator Cooper, 93 Cong. Rec. 2297.

[58] Remarks of Representative Walter, 93 Cong. Rec. 4389. See also statements of Senator Cooper, 93 Cong. Rec. 2297, 2299.

[59] See statements of Senator Cooper, 93 Cong. Rec. 2296-2300. See also Senate Report, p. 48, and the President's message to Congress on approval of the Portal Act, May 14, 1947 (93 Cong. Rec. 5281).

"sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work."[60]

(b) The term "principal activities" includes all activities which are an integral part of a principal activity.[61] Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal Bill.[62] They are the following:

(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the work-benches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

---

[60] See statement of Senator Cooper, 93 Cong. Rec. 2299.

[61] Senate Report, p. 48; statements of Senator Cooper, 93 Cong. Rec. 2297-2299.

[62] As stated in the Conference Report (p. 12), by Representative Gwynne in the House of Representatives (93 Cong. Rec. 4388) and by Senator Wiley in the Senate (93 Cong. Rec. 4371), the language of the provision here involved follows that of the Senate bill.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.[63]

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance.[64] If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes,[65] changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the

---

[63] Statement of Senator Cooper, 93 Cong. Rec. 2297; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350. The fact that a period of 30 minutes was mentioned in the second example given by the committee does not mean that a different rule would apply where such preparatory activities take less time to perform. In a colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2298, Senator Cooper stated that "There was no definite purpose in using the words '30 minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes." In reply to questions, he indicated that any amount of time spent in preparatory activities of the types referred to in the examples would be regarded as a part of the employee's principal activity and within the compensable workday. Cf. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 693.

[64] See statements of Senator Cooper, 93 Cong. Rec. 2297-2299, 2377; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350.

[65] Such a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work. See footnote 49.

employee's principal activity.[66] On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity.[67] However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.[67]

[12 FR 7655, Nov. 18, 1947, as amended at 35 FR 7383, May 12, 1970]

---

[66] See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298.

[67] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2305-2306, 2362; statements of Senator Cooper, 93 Cong. Rec. 2296-2297, 2298.

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
AUG - 4 2014
OFFICE OF THE CLERK

No. 13-433

IN THE

Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC.,

Petitioner,

v.

JESSE BUSK AND LAURIE CASTRO, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

MARK R. THIERMAN
Counsel of Record
JOSHUA D. BUCK
THIERMAN LAW FIRM, P.C.
7287 Lakeside Drive
Reno, Nevada 89511
(775) 284-1500
mark@thiermanlaw.com

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

Counsel for Respondents

QUESTIONS PRESENTED

(1) Does the time an hourly employee spends participating in an employer-mandated anti-theft search constitute "work" within the meaning of the Fair Labor Standards Act?

(2) If such a search occurs at the end of the workday, is the employee's time nonetheless non-compensable as a postliminary activity under the Portal-to-Portal Act?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS. ii

TABLE OF CITED AUTHORITIES v

REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. The Legal Framework 1

1. The Definition of "Work" Under The FLSA 2

2. The Emergence Of The Dichotomy Between Employer-Required Activities and Practical Necessities 2

B. Early Overtime Claims Based On Employer-Mandated Searches 7

C. Proceedings Below 8

SUMMARY OF ARGUMENT .. .. .11

ARGUMENT. 14

Table of Contents

Page

I. Participation In An Employer-Mandated Search For Stolen Merchandise Is Work Under The FLSA Because It Is Done At The Direction Of And For The Benefit Of The Employer 15

A. An Activity Required by and Benefitting the Employer Constitutes Work Under the FLSA 15

B. Participation In The Search In This Case Was Work Under the FLSA... ...21

II. Because Integrity Mandated Participation In This Search, It Is Not A Postliminary Activity Under The Portal-to-Portal Act.. ...22

A. Section 254(a) Does Not Limit Compensability To Activities That Meet The *Steiner* "Integral and Indispensable" Standard 23

B. This Search Is Neither Walking Under Section 254(a)(1) Nor Preliminary and Postliminary Activity Under Section 254(a)(2) ... .33

C. The Standards Proposed By Integrity And The Government Are Legally Incorrect And Would Lead To Untenable Results .. ... .39

Table of Contents

Page

III. The Purpose of the FLSA (Untouched By The Portal-to-Portal Act) Is Not Only To Compensate Workers For Working More Than 40 Hours In A Workweek, But Also To Encourage Employers To Implement Efficiencies And Spread Work In Order To Reduce Employee Overtime . . .44

IV. The Court Should Not Adopt A Per Se Rule Regarding Whether "Security Screening" Is Work Under The FLSA Or A Principal Activity Under The Portal-to-Portal Act. . . .46

CONCLUSION 51

APPENDIX 1a

TABLE OF CITED AUTHORITIES

Page

Cases

Alvarado v. Costco Wholesale Corp.,
2008 WL 2477393 (N.D. Cal. June 18, 2008) . . .49, 51

Alvarez v. IBP, Inc.,
339 F.3d 894 (9th Cir. 2003) 16

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 680 (1946). . . . . *passim*

Armour & Co. v. Wantock,
323 U.S. 126 (1944). 2, 15, 16, 17

Barrentine v: Arkansas-Best Freight System, Inc.,
750 F.2d 47 (8th Cir. 1984). 23

Bay Ridge Operating Co. v. Aaron,
334 U.S. 446 (1948). 45, 46

Blair v. Wills,
420 F.3d 823 (8th Cir. 2005) 16

Bonilla v. Baker Concrete Construction, Inc.,
487 F.3d 1340 (11th Cir. 2007). 11, 50

Chao v. Tradesmen Int'l, Inc.,
310 F.3d 904 (6th Cir. 2002). 16

De Ascencio v. Tyson Foods, Inc.,
500 F.3d 361 (3d Cir. 2007) 16

Cited Authorities

Page

Dunlop v. City Electric, Inc.,
537 F.3d 394 (5th Cir. 1976). 23, 39

Durkin v. Steiner,
111 F. Supp. 546 (M.D. Tenn. 1953) 19

Frlekin v. Apple, Inc.,
2014 WL 2451598 (N.D.Cal. May 30, 2014) 51

Gorman v. Consol. Edison Corp.,
488 F.3d 586 (2d Cir. 2007) 11, 50

Hoffman–La Roche Inc. v. Sperling,
493 U.S. 165 (1989) 9

IBP, Inc. v. Alvarez,
546 U.S. 21 (2005). . . . . *passim*

In re Curtis Mathes Mfg. Co.,
1979 Lab. Arb. LEXIS 298, 73 Lab. Arb. Rep.
(BNA) LA 103 (1979) 8

In re Safeway Stores, Inc.,
44 Lab. Arb. (BNA) 1193 (1985) 8

In re U.S. Marine Corps Supply Ctr. and
American Fed'n of Gov't Employees,
1975 Lab. Arb. LEXIS 308, 65 Lab.
Arb. (BNA) 59 (1975) 7, 8

Cited Authorities

Page

Jewel Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America,
325 U.S. 161 (1945) 2

Kellar v. Summit Seating, Inc.,
664 F.3d 169 (7th Cir. 2011) 23

Leone v. Mobil Oil Corp.,
523 F.3d 1153 (D.C. Cir. 1975). 16

Manning v. Boston Medical Center,
775 F.3d 34 (1st Cir. 2013) 16

Mitchell v. King Packing Co.,
350 U.S. 260 (1956) 6, 19, 41

Mitchell v. Southeastern Carbon Paper Co.,
228 F.2d 934 (5th Cir. 1955) 23

Overnight Motor Transp. Co. v. Missel,
316 U.S. 572 (1942) 45

Perez v. Mountaire Farms, Inc.,
50 F.3d 350 (4th Cir. 2011) 16

Reich v. New York City Transit Authority,
45 F.3d 646 (2d Cir. 1995) 42, 43

Sandifer v. United States Steel Corp.,
134 S. Ct. 870 (2014) 17, 48

Cited Authorities

Page

Sehie v. City of Aurora,
432 F.3d 749 (7th Cir. 2005) ... .16

Singh v. City of New York,
524 F.3d 361 (2d Cir. 2008) 16

Skidmore v. Swift & Co.,
323 U.S. 134 (1944)... .. .. .16

Steiner v. Mitchell,
215 F.2d 171 (6th Cir. 1954). ... ... .19

Steiner v. Mitchell,
350 U.S. 247 (1956). .. .. *passim*

Stoll v. Runyon,
165 F.3d 1238 (9th Cir. 1999).. 9

Tennessee Coal, Iron & R. Co. v.
Muscoda Local No. 123,
321 U.S. 590 (1944). ... ... *passim*

United Transp. Union Local 1745 v.
Albuquerque,
178 F.3d 1109 (10th Cir. 1999). 16

Von Friewalde v. Boeing Aerospace Operations,
339 Fed. Appx. 448 (5th Cir. 2009). .... .16

Whalen v. United States,
93 Fed. Cl. 579 (Fed. Cl. 2010) 49

Cited Authorities

Page

Statutes and Other Authorities

29 U.S.C. § 203(g) 1

29 U.S.C. § 207(a). 1

29 U.S.C. § 252. 17

29 U.S.C. § 254. 17

29 U.S.C. § 254(a).... ... . *passim*

29 U.S.C. § 254(a)(1) ... . *passim*

29 U.S.C. § 254(a)(2) ... . *passim*

29 C.F.R. § 551.104 ... ... .15

29 C.F.R. § 553.221 25

29 C.F.R. § 785.24 .... .35

29 C.F.R. § 785.26 .... .30

29 C.F.R. § 785.27 ... ...12, 32

29 C.F.R. § 785.41 35

29 C.F.R. § 785.44 ... .31

29 C.F.R. § 785.45 31

Cited Authorities

Page

29 C.F.R. § 785.47 .. ..14, 49

29 C.F.R. § 785.7 ... ...15, 18

29 C.F.R. § 790.2 45

29 C.F.R. § 790.5(b) 29

29 C.F.R. § 790.6 5

29 C.F.R. § 790.6(a) 40

29 C.F.R. § 790.6(b) .... .31

29 C.F.R. § 790.7(b) ... ... .46

29 C.F.R. § 790.7(d) ... ... .35

29 C.F.R. § 790.7(f) ... ... .34

29 C.F.R. § 790.7(g) 33, 34, 37

29 C.F.R. § 790.7(h) 25

29 C.F.R. § 790.8 ... .13

29 C.F.R. § 790.8(a) 22

29 C.F.R. § 790.8(c) 30, 31, 33

Cited Authorities

Page

29 C.F.R. § 790.8(g) 35

61 Stat. 84 (1947) 1

93 Cong. Rec. 2298 . . . . . 29, 30

93 Cong. Rec. 2297-98 30

1 Ellen Kearns, ed., *The Fair Labor Standards Act* (2d ed. 2010) 16, 49

Department of Labor's Field Operations Handbook section 31b05 (2000) 32

Employee Commuting Flexibility Act 27, 28

S. Rep. No. 48, 80th Cong., 1st Sess. 48 29

REGULATIONS INVOLVED

The regulations involved, in addition to those appended to the brief for Integrity and the Government, are set out in an appendix to this brief.

STATEMENT OF THE CASE

A. The Legal Framework

The Fair Labor Standards Act ("FLSA") was enacted in 1938 and provides that a covered employee who "is employed for a workweek longer than forty hours" must be paid for any hours in excess of forty at a rate at least one and one-half times his or her regular rate. 29 U.S.C. § 207(a). "Employ" is defined as "to suffer or permit to work." 29 U.S.C. § 203(g). The FLSA itself does not contain a definition of "workweek" or "work."

Congress amended the FLSA in 1947 with passage of the Portal-to-Portal Act. 61 Stat. 84 (1947). The Portal-to-Portal Act "narrowed the coverage of the FLSA slightly by excepting two activities that had been treated as compensable under [prior Supreme Court] cases: walking on the employer's premises to and from the actual place of performance of the principal activity of the employee, and activities that are 'preliminary or postliminary' to that principal activity." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 27 (2005) (quoting 29 U.S.C. § 254(a)). As with the FLSA, the Portal-to-Portal Act itself does not define "work." The Portal-to-Portal Act left unchanged this Court's prior precedent relating to what constitutes "work" under the FLSA. *IBP*, 546 U.S. at 28 ("[T]he Portal-to-Portal Act does not purport to change this Court's earlier

descriptions of the terms 'work' and 'workweek', or define the term 'workday.'").

1. The Definition of "Work" Under The FLSA

The first case to address the definition of "work" under the FLSA was *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). In *Tennessee Coal*, this Court held that "work" means "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R. Co.*, 321 U.S. at 598; *see also Jewel Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 325 U.S. 161, 164-66 (1945). Subsequently, in *Armour & Co. v. Wantock*, this Court made clear that work also includes a period of time during which an employer directs a worker to be on its premises, even if the worker is only waiting to engage in some affirmative exertion. *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944). Thus, under *Tennessee Coal* and *Armour* work is any activity "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."

2. The Emergence Of The Dichotomy Between Employer-Required Activities and Practical Necessities

In *Anderson v. Mt. Clemens Pottery Co.*, this Court significantly broadened its interpretation of "work." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). *Mt. Clemens* expanded the "require[ment]" element of the *Tennessee Coal* to encompass two distinct concepts: (1)

activities that are required because they are employer-directed and (2) activities that are required merely in the sense that they are a "practical necessity". *Mt. Clemens*, 328 U.S. at 690-91 ("[T]he statutory workweek includes all time during which an employee is *necessarily required* to be on the employer's premises . . . .") (emphasis added). The Court held that the time employees spent walking from the time clocks where they punched in at the factory gate to the work areas where they made pottery was compensable work, not because the employer had issued any directive about how workers were to get from the time clock to their work stations, but because that internal travel was a practical necessity. *Id.* at 691 ("[T]hey walked on the employer's premises only because they were compelled to do so by the necessities of the employer's business."). The decision in *Mt. Clemens* set in motion events that led to the adoption of the Portal-to-Portal Act.

As the title of the Act makes clear, the primary concern behind the Portal-to-Portal Act was to address *Mt. Clemens*' holding that work under the FLSA includes the entire period between when an employee enters the employer's premises at the beginning of the day and when the employee exits at the end, even though part of that time is devoted merely to traveling between the entrance and the employee's work station. The Portal-to-Portal Act provides limited immunity from liability, in pertinent part, as follows:

> [N]o employer shall be subject to any liability under the Fair labor Standards Act on account of the failure of such employer to pay an employee overtime compensation, for or on account of any of the following activities

> of such employee engaged in on or after May 14, 1947—
>
> > (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
> >
> > (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a). Section 254(a) consists of two exclusions (subsections (1) and (2)) which are themselves subject to a limitation (in the phrase which begins "which occurred either"). The limiting language that follows subsection (2) embodies the continuous workday rule. Under that rule, an employee is entitled to compensation from the first work of the day until the last work of the day, regardless of whether during some portion of the period in between he or she is doing something that in and of itself would not be considered "work" (e.g., waiting for the next customer, going to the wash room, or chatting with a co-worker). *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005). The same rule applies to walking and waiting that occurs between the first and last principal activities of workday. "[D]uring a continuous workday, any walking time that occurs after

the beginning of the employee's first principal activity and before the end of the employee's last principal activity is excluded from the scope of [section 254(a) of the Portal-to-Portal Act], and as a result is covered by the FLSA." *IBP*, 546 U.S. at 37; *see* 29 C.F.R. § 790.6.

The first case to address the meaning of "work" under the FLSA and the scope of the exclusions in section 254(a) of the Portal-to-Portal Act was *Steiner v. Mitchell*, 350 U.S. 247 (1956). Like *Mt. Clemens*, the activity at issue in *Steiner* was not required by an employer-directive; rather, it was required as a practical necessity. *Id.* at 250. The workers in *Steiner* were employed at a battery manufacturing plant pervaded by dangerous lead and acid, which would destroy a worker's clothing and endanger a worker's health. *Id.* at 251. Although many of the workers in that case chose to change clothes for safety reasons at the beginning and end of the day at the employer's facility, the employer did not *require* the workers to do so.[1] This Court granted review to decide both whether the donning and doffing of those work clothes constituted "work" under the FLSA, and whether it was excluded from compensation by section 254(a).

Steiner held that the donning and doffing was indeed work and that this work was outside the scope of the section 254(a) exclusions. *Steiner*, 350 U.S. at 255. In doing so, the Court emphasized that under the circumstances of the case, wearing non-street clothes on the job, and thus the donning and doffing thereof, were "integral and indispensable" to the work of the employees in the plant.

---

1. *See* Petitioners' Brief and Argument on the Merits, No. 22 (O.T. 1955), 4, available at 1955 WL 72535.

Id. at 252. That "integral and indispensable" analysis arose out of an activity that was not required by an employer-directive, but was rather a practical necessity for the employees. *Id.* at 252; *see also Mitchell v. King Packing Co.*, 350 U.S. 260 (1956) (sharpening a knife is a practical necessity for cutting meat).

More recently, this Court addressed the continuous workday doctrine and compensable activities under the FLSA in *IBP, Inc. v. Alvarez*. *IBP* held that the exceptions contained in 29 U.S.C. § 254(a) are not applicable after an employee engages in his or her first principal activity and prior to the end of that employee's last principal activity. *IBP*, 546 U.S. at 37. The Court reiterated the rule in *Steiner* that "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under § 4(a) of the Portal-to-Portal Act." *Ibid.* *IBP* also recognized the singular importance of an employer directive, noting that certain activities that would not be compensable if engaged in voluntarily would be work if ordered by an employer. *IBP*, 546 at 40, n.8. It held that although waiting at the beginning of the day to don protective gear would not by itself be compensable, an employee would be entitled to compensation if his or her employer ordered the worker to be on the premises during that same period of time. *Ibid.* ("[O]ur analysis would be different if [the employer] required its employees to arrive at a particular time in order to begin waiting."). The Court further held that waiting in line to "doff" the same clothing at the end of the day was compensable because of the continuous workday rule, since the doffing was also a principal activity necessitated by the job. *Id.* at 22-23.

B. Early Overtime Claims Based On Employer-Mandated Searches

Prior to 2009 the only published rulings under the FLSA and Portal-to-Portal Act regarding searches of employees were arbitration decisions regarding overtime claims based on such employer-imposed searches. *In re U.S. Marine Corps Supply Center*, held that federal workers were entitled to overtime payments for a period of time during which the workers were unable to leave the parking lot where they worked because government officials had decided to search every car for an item they believed had been stolen. *In re U.S. Marine Corps Supply Ctr. and American Fed'n of Gov't Employees*, 1975 Lab. Arb. LEXIS 308, 65 Lab. Arb. (BNA) 59, *1 (1975) (King, Arb.). Although the search of each car had taken only about a minute, there were an "inadequate number of personnel assigned to accomplish the search." *Id.* As a result, the departing workers were delayed as much as 35-minutes. *Ibid.* In holding that the workers were entitled to overtime pay, the arbitrator relied on the FLSA, which had become applicable to federal employees[2] as well as the Labor Department "Hours Worked" regulations. *Id.* at *9. The arbitrator rejected the government's contention that the search (and related delay) were not work; "[t]he fact that the[] [employees] performed no physical or mental labor during that period is not controlling. The employees

---

2. Citing: "Interim Instructions for Implementing the Fair Labor Standards Act. Basic Rule: Hours work (sic), in general include all the time an employee is *required to be* on duty or on the Agency's premises or at a prescribed work place, and all time during which he is suffered or permitted to work for the agency." *U.S. Marines Corps Supply Ctr.*, 65 Lab. Arb. (BNA) at *9 (emphasis in opinion).

were required to remain on the premises of the employer for its benefit . . ." *Id.* at *10.

In re Curtis Mathes Mfg. Co., construed the FLSA and Portal-to-Portal Act in a similar fashion. *In re Curtis Mathes Mfg. Co.*, 1979 Lab. Arb. LEXIS 298; 73 Lab. Arb. Rep. (BNA) LA 103 (1979) (Allen Jr., Arb.), The arbitrator concluded from a review of other cases "that arbitrators are persuaded to conclude that security searches and similar types of delays are compensable if the amount of time involved is not considered '*de minimis*.'" *Id.* at *12. Citing the decision in *U.S. Marine Corps Supply Ctr.*, the arbitrator reasoned that "such delays can be considered as 'hours worked' since the employer retains control and authority over workers." *Ibid.* The arbitrator rejected the overtime claim in that case only because it was *de minimis*, relying on the fact that the search in question had occurred on only a single occasion. *Id.* at *17. The arbitrator noted that a claim would not be *de minimis* if the practice or delay were a regular occurrence of 10 minutes per day. *Ibid.; see also, In re Safeway Stores, Inc.*, 44 Lab. Arb. (BNA) 1193, 1194-95 (1985) (Gentile, Arb.) (Overtime claim upheld on contractual grounds arising out of a search that delayed workers' departure by 35 minutes.).

C. Proceedings Below

Petitioner Integrity Staffing Solutions, Inc., ("Integrity") provides employees to perform the labor at many Amazon.com warehouses nationwide. Pet. App. 3-4, 20; J.A. 18-19. Respondents (and plaintiffs in the District Court) Busk and Castro ("Plaintiffs") worked for Integrity as hourly employees in Nevada warehouses, filling orders

placed by Amazon.com customers. Pet. App. 3-4; J.A. 17-18, 20. At the end of each day, after they had clocked out, plaintiffs were not permitted to leave the warehouse until they had been subjected to an anti-theft security search. J.A. 21-22. During the search process, plaintiffs and other employees "were required to remove all personal belongings from their person[s] such as wallets, keys, and belts, and pass through metal detectors before being released from work and allowed to leave the facility." J.A. 22. The screening process required plaintiffs to wait approximately 25 minutes each day at the end of each shift. J.A. 21. This time could have easily been reduced to a *de minimis* amount through the addition of more security checkers and/or staggering the quitting time of the shifts, so that employees could move through the clearance more quickly. J.A. 27. Plaintiffs commenced this action in federal district court, asserting that Integrity violated the FLSA because it did not pay them overtime for the time spent waiting for and during in the search process. J.A. 23, 24-28. The complaint asked the court to permit the FLSA claim to be heard as a collective action on behalf of all similarly situated Integrity employees nationwide.[3]

---

3. First Amended Complaint ("FAC"), ¶ 21. The FLSA requires individuals who wish to take part in the proceedings to opt in individually. Pet. App. 5-6. Because this case was dismissed at the pleadings stage and otherwise stayed during the appeal process, plaintiffs have been denied the opportunity to send out court-approved notices of the pendency of the FLSA action as provided in *Hoffman–La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989). *See Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) ("Equitable tolling applies when the plaintiff is prevented from asserting a claim by wrongful conduct on the part of the defendant, or when extraordinary circumstances beyond the plaintiff's control made it impossible to file a claim on time.").

The district court dismissed the complaint for failure to state a claim on which relief could be granted. Pet. App. 19-35. The district court rejected plaintiffs' contention that participation in the search itself "was a princip[al] activity [under the Portal-to-Portal Act] because this exercise was a daily requirement . . . ." Pet. App. 27. It held that plaintiffs were entitled to compensation for the time consumed by the search only if they could show that it was "integral and indispensable to their principal activities as warehouse employees fulfilling online purchase orders." *Id.* The district court concluded that the searches were not integral and indispensable to the warehouse duties because "[p]laintiffs could perform their warehouse jobs without such daily security screenings." Pet. App. 28. The district court opinion suggested that all security screenings are non-compensable under the FLSA and the Portal-to-Portal Act. Pet. App. 28 and n.2.

The Ninth Circuit reversed. The Ninth Circuit rejected "a blanket rule that security clearances are noncompensable." Pet. App. 13. The court of appeals correctly utilized the definition of "work" (and "principal activity") and concluded that the search in this case was compensable because it was required by the employer (as a direct employer-mandate) and for the benefit the employer.

> Busk and Castro have alleged that Integrity requires the security screenings, which must be conducted at work. They also allege that the screenings are intended to prevent employee theft—a plausible allegation since the employees apparently pass through the clearances only on their way out of work, not when they enter. As alleged, the security

> clearances are necessary to employees' primary work as warehouse employees and done for Integrity's benefit. Assuming, as we must, that these allegations are true, the plaintiffs have stated a plausible claim for relief.

Pet. App. 12-13. The Court of Appeals noted that the complaint alleged that the employer "requires the screening to prevent employee theft, a concern that stems from the nature of the employees' work (specifically, their access to merchandise)." Pet. App 12. The Ninth Circuit distinguished the anti-theft screening in this case from security checks directed at or applied to the general public. *Id.; compare Gorman v. Consol. Edison Corp.*, 488 F.3d 586 (2d Cir. 2007) (screening of anyone entering or leaving a nuclear power plant); *Bonilla v. Baker Concrete Construction Inc.*, 487 F.3d 1340 (11th Cir. 2007) (screening to permit only certain workers, but not the public, to access the tarmac at an airport).

SUMMARY OF ARGUMENT

This Court's decisions defining what constitutes "work" under the FLSA encompass two distinct types of activities: (1) activities that are expressly ordered by an employer and (2) activities which, although not so ordered, employees must as a practical matter engage in because of the non-mandated activity's connection with some ordered activity. The "integral and indispensable" standard in *Steiner v. Mitchell,* delineates work of the second type. That standard supplements, rather than limits, the usual rule that work includes an activity that is both required by and beneficial to the employer. Numerous Department of Labor regulations provide that

the existence of an employer directive is sufficient (albeit not necessary) to render an activity "work," even when that mandated activity is not related to the worker's other responsibilities. For example, the regulations provide that an employer requirement that a worker attend a class or lecture is work even if the subject matter involved "is not directly related to the employee's job." 29 C.F.R. § 785.27.

Steiner does not mean, as Integrity and the Government appear to contend, that employer-required pre- and post-shift activity is not compensable unless the employer has ordered the worker to do something that is directly or closely related to that worker's shift work. If an employer requires a worker to engage in pre- or post- shift activity for the benefit of the employer, that activity is work within the scope of the FLSA, even if it is wholly unrelated to the employee's shift work. Under the interpretation of the law advanced by Integrity and the Government, Integrity could require warehouse workers, prior to or after their paid shift, to engage without compensation in any mandatory work activity that was not closely related to filling Amazon.com customer orders, such as mowing the lawn in front of the warehouse or washing the bosses car. The statute and regulations clearly do not permit an employer to require uncompensated, "off-the-clock" work so long as it is not essential to a worker's paid activity.

The activity at issue in this case easily falls within the definition of work under the FLSA. The complaint alleges that workers are required, prior to leaving the warehouse, to take part in a search of their persons. That search, intended to detect and deter theft of property, obviously benefitted the employer. J.A. 22. If a worker were required to come into the warehouse on his or her day

off to take part in a search—such as a search of his or her locker, cell phone or person—that activity would constitute work. Just like the lawn mowing by a warehouse worker after the end of a shift, the search becomes a part of that employee's job, and therefore, a principal activity per se, and is compensable. 29 C.F.R. § 790.8 ("The 'principal activities' referred to in the statute are activities which the employee is 'employed to perform'").

The Department of Labor's regulations provide that checking in and checking out, under ordinary circumstances, are preliminary or postliminary activities. But being searched is obviously different from checking in and out. Checking in and out is an activity that identifies for the employer which specific workers have entered or left the premises or work area, and usually makes a record of the time at which they did so. A search does neither of those things; a guard or other searcher typically would not ask for employee identification at the time of the search or make a record of who was searched or when. The employer does not even care about the identity of the worker searched unless there is a problem. Moreover, an activity that would otherwise constitute work does not become postliminary merely because it occurs at the end of the day. Under the regulations and well-established precedent, turning in reports, clothes, or equipment are common end-of-day activities that constitute work and principal activities; those activities do not become non-compensable simply because they are moved to a location near an exit. 29 C.F.R. § 790.8 ("The legislative history further indicates that Congress intended the words "principal activities" to be construed liberally to include any work of consequence performed for an employer, no matter when the work is performed.").

Most searches and security screenings do not give rise to claims under the FLSA. In most circumstances, the time involved in connection with a search would be so brief as to be *de minimis*. *See* 29 C.F.R. § 785.47. In the instant case, Integrity could in any number of ways render *de minimis* the search and any related delays. Furthermore, many searches or screenings apply to and may be directed primarily at members of the general public entering or exiting a building; in that circumstance, the agency or company imposing that condition on entry onto its property would be acting as the proprietor of the facility, not as an employer.

ARGUMENT

The compensability of a particular activity under the FLSA turns on two distinct questions: whether it constitutes "work" within the meaning of the FLSA, and whether a claim for compensation for that "work" is precluded by section 254(a) of the Portal-to-Portal Act.

Although the instant litigation concerns a post-shift search, it turns on a more fundamental and far reaching dispute about the general legal standards governing the compensability of pre- and post-shift[4] activities. The briefs for Integrity and the Government suggest, for example, that employer-mandated pre- and post-shift activities are only compensable if the activity in question is integral and indispensable to the primary shift duty of an employee. Such an interpretation of the FLSA would permit employers to impose countless unpaid tasks on

4. Plaintiffs use the term "shift" to refer to the period of time for which an employer is paying a worker.

their workers. A receptionist could be required to come in early and make coffee without pay. A computer technician could be ordered to stay late to wash the windows without compensation. The arguments advanced in this case are replete with such broader implications.

I. Participation In An Employer-Mandated Search For Stolen Merchandise Is Work Under The FLSA Because It Is Done At The Direction Of And For The Benefit Of The Employer

A. An Activity Required by and Benefitting the Employer Constitutes Work Under the FLSA

Any activity "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business" is "work" under the FLSA. *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944); *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944). Both the Department of Labor regulations, 29 C.F.R. § 785.7[5], and virtually

---

5. Section 785.7 provides:

> The United States Supreme Court originally stated that employees subject to the act must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." (*Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944) . . . . The Portal-to-Portal Act did not change the rule except to provide an exception for preliminary and postliminary activities.

See 29 C.F.R. § 551.104 ("Hours of work means all time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency.")

every court of appeals[6] continue to utilize that definition. *See* 1 Ellen Kearns, ed., *The Fair Labor Standards Act* (2d ed. 2010), 8-11 ("The proper inquiry as to whether activities constitute 'work' is . . . whether it is 'controlled or required by the employer and pursued for the benefit of the employer.'") (quoting *Tennessee Coal*).

An activity is "work" within the meaning of the FLSA even if an employer directs an employee to do nothing other than to be on its premises. "[A]n employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. . . . . Readiness to serve may be hired, quite as much as service itself . . . . [I]nactive duty may be duty nonetheless ." *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1945); *Skidmore v. Swift & Co.*, 323 U.S. 134, 136–37 (1944). The employer in *Armour* had cited *Tennessee Coal's* passage describing "work" as "physical or mental exertion" required by an employer; the company argued that merely waiting for something to do involved no such exertion. In rejecting that contention, the Court emphasized that the definition in *Tennessee Coal* was intended only to explain why the circumstances of that

---

6. *See e.g.*, *Manning v. Boston Medical Center*, 775 F.3d 34, 46 (1st Cir. 2013); *Singh v. City of New York*, 524 F.3d 361, 367 (2d Cir. 2008)(opinion by Sotomayor, J.); *De Ascencio v. Tyson Foods, Inc.*, 500 F.3d 361, 365 (3d Cir. 2007); *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 363 (4th Cir. 2011); *Von Friewalde v. Boeing Aerospace Operations*, 339 Fed.Appx. 448, 453 n.3 (5th Cir. 2009); *Chao v. Tradesmen Int'l, Inc.*, 310 F.3d 904, 907 (6th Cir. 2002); *Sehie v. City of Aurora*, 432 F.3d 749, 751 (7th Cir. 2005); *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005); *Alvarez v. IBP, Inc.*, 339 F.3d 894, 902 (9th Cir. 2003), *aff'd sub nom. IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005); *United Transp. Union Local 1745 v. Albuquerque*, 178 F.3d 1109, 1117 (10th Cir. 1999); *Leone v. Mobil Oil Corp.*, 523 F.3d 1153, 1162 (D.C.Cir. 1975).

particular case constituted work, and not to establish an exclusive definition limiting the scope of the FLSA with regard to other dissimilar circumstances. *Armour*, 323 U.S. at 133.

In *Anderson v. Mt. Clemens Pottery Co.*, this Court adopted the more far reaching holding that an employee is entitled to compensation for the entire time he or she needs to be on the employer's premises, even for the period when the worker is walking between the factory gate and his or her workstation. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691 (1946). Congress enacted the Portal-to-Portal Act in response. *Sandifer v. United States Steel Corp.*, 134 S. Ct. 870, 875 (2014); *IBP*, 546 U.S. at 27.[7]

The Portal-to-Portal Act did not establish a new definition of "work"; rather, it only limited in two specific ways the application of the existing definition. Absent a contract or custom to the contrary, section 254(a) precludes employer liability for claims based on certain travel (section 254(a)(1)) or for "preliminary" or "postliminary" activity (sections 254(a)(2)). *See IBP*, 546

---

7. This case is concerned with the narrow prospective provisions of 29 U.S.C. § 254 rather than the broad retrospective general amnesty provisions of 29 U.S.C. § 252, which shows that if Congress wanted to grant broad relief, it could easily have done so. *See* Brief for the Secretary of Labor, *Steiner v. Mitchell*, 10-11 ("[A] sharp distinction must be drawn between the broad exclusionary standard adopted in relation to suits for back pay for alleged pre-Portal-to-Portal Act violations (Sec. 2) and the discrete, more liberal set of criteria governing future (i.e., post-enactment rights of compensation) (Sec. 4) . . . Congress, in dealing with the declared 'existing emergency,' did not propose to alter drastically or permanently the future operation of the Fair Labor Standards Act.").

U.S. at 28 ("Other than its express exceptions for travel to and from the location of the employee's 'principal activity,' and for activities that are preliminary or postliminary to that principal activity, the Portal-to-Portal Act does not purport to change this Court's earlier descriptions of the terms 'work,' and 'workweek,' or to define the term 'workday.'") "[T]he [Portal-to-Portal] Act preserved potential liability for working time not made compensable by contract or custom but narrowed the coverage of the FLSA by excepting two activities that had been treated as compensable under our cases: walking on the employer's premises to and from the actual place of performance of the principal activity of the employee, and activities that are 'preliminary or postliminary' to that principal activity."[8] Any activity which is a "principal activity" remains compensable under section 254(a).

Steiner v. Mitchell, interpreted both the meaning of work under the FLSA and the scope of the exclusions in section 254(a) of the Portal-to-Portal Act. *Steiner*, 350 U.S. at 255. *Steiner* concerned the compensability of activities that were required as a practical necessity to perform a particular job, as distinct from activities that were required by an employer-directive. *Id.* at 252-53. *Steiner* held that an activity that is not required by an employer-directive would nonetheless constitute work if it is integral

8. The Government endorses this view. "[T]he Portal-to-Portal Act left unchanged the 'Court's earlier descriptions of the terms "work" and "workweek," though it added 'express exceptions for travel to and from the location of the employee's "principal activity," and for activities that are preliminary or postliminary to that principal activity.' *IBP*, 546 U.S. at 28." U.S. Br. 3-4. The Department of Labor regulations adopted that interpretation of section 254(a) several decades before this Court's decision in *IBP*. *See* 29 C.F.R. § 785.7.

and indispensable to the worker's formal assignments. *Id.* at 252. The workers in that case were not required by the employer to change clothes before and after their shift and some did not.[9] This Court endorsed the lower court's conclusion that even though (or if) the activities were not required by an employer-directive, the activities were nonetheless required as a practical necessity because changing clothes was integral and indispensable to the employees' work manufacturing batteries. *Id.* at 256. As a result, changing clothes was both work (and thus compensable under the FLSA) and a principal activity under the Portal-to-Portal Act (thus outside the scope of the section 254(a) exclusions).

> The trial court held that these activities "are made necessary by the nature of the work performed" that they "directly benefit [the employer] in the operation of their business, and that they "are so closely related to other duties performed by [the] employee as to be an integral part thereof and are, therefore, included among the principal activities of said employees."

350 U.S. at 253[10]; *see also Mitchell v. King Packing Co.*, 350 U.S. 260, 263 (1956) (applying integral and

---

9. *See Durkin v. Steiner*, 111 F. Supp. 546, 548 (M.D.Tenn. 1953) ("there are some employees who did not change clothes"); *Steiner v. Mitchell*, 215 F.2d 171, 172 (6th Cir. 1954) ("most . employees" change clothes).

10. Both the district court and the court of appeals had held that changing clothes was so necessary to the work of the employees as to be part of those duties. *Steiner v. Mitchell*, 215 F.3d at 172; *Durkin v. Steiner*, 111 F. Supp. at 547-48.

indispensable standard to knife sharpening that was practically necessary for an employee's work). *Steiner* supplemented, but it did not displace, the definition of work in *Tennessee Coal*. Work under the FLSA includes both activities that are "an integral part" of a worker's assigned duties (thought not expressly assigned by the employer), as well as all expressly assigned duties themselves.[11] The characterization of an activity does not change merely because the activity occurs at the end of the shift.

This Court more recently addressed the scope of "work" and the Portal-to-Portal Act in *IBP, Inc.*, 546 U.S. at 12. *IBP* made clear that that the term "principal activities" refers to activities, other than those excluded by sections 254(a)(1) and 254(a)(2), which would constitute "work" under the FLSA. *IBP*, 546 U.S. at 27-28. *IBP* holds that the exclusions in section 254(a)(1) and 254(a)(2) are the only "exceptions" created by the Portal-to-Portal Act to the Court's prior definitions of "work" and "workweek." *Id.* at 28. The phrase "principal activity or activities" thus does not contain some tacit third limitation on what is work under the FLSA."[12] Thus, a "principal activity" is "work"

---

11. A number of the lower courts have fashioned hybrid standards for compensability that in various ways combine elements of the analytically distinct *Tennessee Coal* and *Steiner* tests, although the ultimate conclusions in those cases are not necessarily incorrect under the more complete analysis presented here.

12. "Principal activities" necessarily does not include either section 254(a)(1) travel and section 254(a)(2) preliminary and postliminary activity, because otherwise section 254(a) would be meaningless. Section 254(a)(1) travel or section 254(a)(2) preliminary or postliminary activities could not occur "prior to" or "after" the first and last "principal activities" of the workday if they were themselves principal activities.

other than the activities specifically excluded by sections 254(a)(1) and 254(a)(2).[13]

B. Participation In The Search In This Case Was Work Under the FLSA

The complaint in this case clearly alleges circumstances that constitute work under *Tennessee Coal*. The First Amended Collective and Class Action Complaint ("FAC") asserts that the plaintiffs were "required to go through a security search before leaving the facilities at the end of the day," "required to wait in line in order to be searched," and "required to remove all personal belongings from their person . . . and pass through metal detectors before being released from work and allowed to leave the facility." FAC ¶¶ 15-17; J.A. 21-22. The complaint in this case repeatedly alleges that the employer commanded the employees to wait and then undergo the exit search and bag check for stolen inventory. *Id.* The task of waiting in line and then undergoing a screening at the end of the day was specifically required by the employer. J.A. 19, 21. An Integrity employee could not leave the warehouse unless he or she stood on line and waited to be searched by order of the employer. J.A. 19, 21-22. The complaint also alleges that these requirements benefited Integrity,

---

13. Integrity insists that in adopting the Portal-to-Portal Act "Congress swiftly and emphatically rejected th[e] approach" in the *Tennessee Coal* definition of work. Pet. Br. 21 (quoting *Tennessee Coal*); *see* Pet. Br. 35 ("[t]he express purpose of the Portal-to-Portal Act was to overthrow the *ancient regime*"). But *IBP* makes clear, and the Government agrees, the Portal-to-Portal Act had a far more limited effect, excluding only the specific activities delineated in section 254(a)(1) and 254(a)(2), and leaving otherwise intact the *Tennessee Coal* definition.

which the Ninth Circuit considered a plausible allegation supported by the fact that the search was conducted only upon exiting. FAC ¶ 11; J.A. 19, 21.

If an employer were to require a worker to come into the plant or office on his or her day off, and spend 25 minutes participating in a search (or waiting to be searched), there would be no serious question that the activity constituted work for which compensation was required. That would be true whether the work consisted of going through the worker's locker or purse, rummaging through the worker's cell phone, providing a blood or urine test, or—as here—searching the workers and thier bags. The Government acknowledges that at least some employer-imposed searches are compensable, but does not propose a rule to distinguish them from assertedly non-compensable searches. U.S. Br. 31 n.18.

II. Because Integrity Mandated Participation In This Search, It Is Not A Postliminary Activity Under The Portal-to-Portal Act

The employer-mandated search in this case was a principal activity, and thus compensable. "The legislative history indicates that Congress intended the words 'principal activities' to be liberally construed . . . to include any work of consequence performed for an employer, no matter when the work is performed." 29 C.F.R. § 790.8(a).[14] As a number of circuits have repeatedly recognized, to be

14. The Government acknowledges the correctness of that regulation. U.S. Br. 21 ("As the regulations indicate, 'Congress intended the words 'principal activities' to be construed liberally . . . to include any work of consequence performed for an employer, no matter when the work is performed.'" 29 C.F.R. 790.8(a).").

excluded by section 254(a), activities "must be undertaken 'for the employees' own convenience, not being required by the employer and not being necessary for the performance of their duties for the employer." *Dunlop v. City Electric, Inc.*, 537 F.3d 394, 398 (5th Cir. 1976) (citing *Mitchell v. Southeastern Carbon Paper Co.*, 228 F.2d 934 at 939 (5th Cir. 1955)).[15] If the search itself was a principal activity, the waiting period that preceded the search, is also compensable under the continuous workday rule because the final principal activity of the day—the search—had not yet been completed. Waiting to be searched at the end of the day is like waiting in line to doff required clothing or safety equipment in *IBP*.

A. Section 254(a) Does Not Limit Compensability To Activities That Meet The *Steiner* "Integral and Indispensable" Standard

Integrity argues that pre- and post-shift work is a non-compensable preliminary or postliminary activity under section 254(a) unless an employee can affirmatively demonstrate that the *Steiner* "integral and indispensable" standard is met. This is true only for activities that are *not* mandated by the employer; absent such an employer directive, an activity would only be work (and thus a principal activity) if it were necessary as a practical matter for the worker to perform the assigned tasks. *Steiner*, *IBP*, the text of section 254(a), and the Department of Labor's regulations each make clear that an activity which is *required* by an employer-mandate need not also satisfy the "integral and indispensable" standard.

---

15. *See Kellar v. Summit Seating, Inc.*, 664 F.3d 169, 175 (7th Cir. 2011) (quoting *Dunlop*); *Barrentine v. Arkansas-Best Freight System, Inc.*, 750 F.2d 47, 50 (8th Cir. 1984) (quoting *Dunlop*).

(1) In *Steiner* the integral and indispensable standard was merely one method of establishing that an activity was a principal activity and thus outside the section 254(a) exclusions, not the exclusive method for doing so.[16] *Steiner* held that "the term 'principal activity or activities' in Section [254] *embraces* all activities which are an 'integral and indispensable part of the principal activities[]' " *Steiner*, 350 U.S. at 252-53 (emphasis added, footnote omitted). In *Steiner*, the term "embraces" means "includes," not "is limited to." *Ibid.* The purpose of *Steiner* was to address a situation in which an activity (changing clothes) had not been mandated by an employer, but was nonetheless a task-specific practical necessity; the Court in *Steiner* assuredly did not mean to hold that employer-directed tasks are non-compensable unless integral and indispensable to something else.

(2) Second, Integrity's insistence that pre- and post-shift work is noncompensable unless it (in some fashion) satisfies the "integral and indispensable" standard is inconsistent with the holding in *IBP* regarding compulsory waiting time. One question in *IBP* was whether the employees were entitled to compensation for time they spent at the beginning of the day waiting to don certain specialized clothing; the donning itself was held to be "integral and indispensable," and hence, itself a principal

16. Integrity repeatedly insists that in *Steiner* "this Court has held that an activity is compensable *only* if it is an 'integral and indispensable part of the principal activities for which covered workmen are employed.' *Steiner*, 350 U.S. at 256." Pet. Br. 22 (emphasis added). That assertion, in each instance with the key word "only" inserted before the quotation from *Steiner*, is repeated essentially verbatim four other times in Integrity's brief. Pet. Br. 2, 10, 16, 36. *Steiner* never uses the word "only" in this context.

activity. *IBP* held that such pre-donning waiting was noncompensable under section 254(a) if the employer only required the workers to be wearing that clothing when work started, and the waiting occurred simply because there was a line to pick up clothing. *IBP*, 546 U.S. at 40-42.

This Court made clear, however, that the waiting period would have been compensable if the employer had *ordered* the workers to be on its premises during that (or any other) period. "[O]ur analysis would be different if [the employer] required its employees to arrive at a particular time in order to begin waiting." *Id.* at 40 n.8. *IBP* recognized that if the employer had "required its workers to report to the changing area at a specific time", 29 C.F.R. § 790.7(h) would be applicable.[17]

---

17. 29 C.F.R. § 790.7(h) states that when an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities. *Id.* at 41. The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged.(Footnote omitted).

29 C.F.R. § 553.221 states:

> Compensable hours of work generally include all of the time during which an employee is on duty on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer. Such time includes all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related to the performance of the principal activity, such as attending roll call,

An employer-mandated arrival and resulting waiting period would not by itself be integral and indispensable to anything; yet under *IBP* and the governing regulation an employer must compensate a worker who arrives at such a mandated time, even if the employee has nothing to do. The same logic applies to an employer mandate that the employee remain later than the end of the shift, regardless of the employer's purpose in having the employee stay late. If an employer only paid workers until 5:00 p.m., but directed the workers to stay on its premises doing nothing for another hour, that additional one hour period would be compensable even though it was not integral and indispensable to any activity. And if the employer told the employees to stay on the premises another 25 minutes after the shift was over so that the employees could complete another primary activity, the waiting time would assuredly be compensable.

(3) None of the various standards proposed by Integrity and the Government are consistent with the text of section 254(a). Integrity contends that "this Court has held than an activity is compensable *only* if it is an 'integral and indispensable part of the principal activities for which covered workmen are employed.' *Steiner*, 350 U.S. at 256." Pet. Br. 22 (emphasis in original). But the limitation "only" does not appear in *Steiner* itself.[18] This

---

writing up and completing tickets or reports, and washing and re-racking fire hoses.

18. Similarly, the Government asserts that in *IBP* "the Court reiterated that the touchstone for determining whether an activity is compensable under Section 254(a) is whether it 'is "integral and indispensable" to a "principal activity." *IBP*, 546 U.S. at 37." U.S. Br. 4. This characterization of *IBP* is inconsistent with the holding in that case that workers would have been entitled to

proposed standard would exclude activities that are themselves principal activities, but not a "part" of some other principal activity. Elsewhere Integrity asserts that "an activity is compensable under the FLSA only if it is so integral and indispensable to the employee's *other* primary activities that it too counts as part of those primary activities." Pet. Br. 2 (emphasis added). But compensable pre-and post-shift principal activity under section 254(a) is not limited to a principal activity that is integral and indispensable to some "other" principal activity. If that were the rule, an employee would have to have at least two principal activities to be entitled to compensation; but section 254(a) provides for compensability of the "principal activity"—singular—as well as in a case of multiple "principal activities." Other formulas proposed by Integrity would limit "principal activity or activities" to work an employee does during his or her paid shift; pre- and post- shift work could not by itself be a principal activity, and thus could be compensable only if integral and indispensable to some shift work. If that were the case, the use of the phrase "principal activity or activities" in section 254(a) would constitute an additional limitation on what constitutes compensable work, and would exclude any work for which the employer simply refuses to pay. *IBP* held, however, that the only limitations in section 254(a) on what constitutes compensable work are those in subsections 254(a)(1) (certain travel) and 254(a)(2) (preliminary and postliminary activities). *IBP*, 546 U.S. at 40-41.[19]

---

compensation if the employer had required them to be at work at a certain time, regardless of whether they were performing any job duties at that time.

19. In 1996 Congress passed the Employee Commuting Flexibility Act ("ECFA") amendment to the Portal-to-Portal

(4) Department of Labor regulations have for decades provided that when an employer directs a worker to do something, the employer must pay the employee for the time spent engaging in that activity, regardless of whether the employer-mandated activity is integral and indispensable to the employee's other job responsibilities.

The regulations regarding the Portal-to-Portal Act specifically address a situation in which an employee is required by his or her employer to engage in activities that are not integral and indispensable to his own work:

> In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such

---

Act of 1947, 29 U.S.C. § 254(a), to provide that merely driving a company car to and from work, or incidental activities such as filling the car with gas, are not compensable, so long the drive was within normal commuting distance and as long as the worker (or his or her union) *has agreed to that arrangement*. This amendment clearly assumes that under prior law, a worker would be entitled to compensation if he or she were ordered to drive the company vehicle to and from work, at least absent some union agreement. The ECFA states:

> For the purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

> 30 minutes distributes clothing or parts of clothing at the work benches of *other employees* and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.
>
> Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act .

29 C.F.R. § 790.5(b) (emphasis added).[20] Although there might be some situations in which assisting other workers would affect an employee's own shift work (such as where the other employees prepare garments on which that employee in question later works), this regulation is not limited to (and, indeed, does not refer to) such cases. Nor would it matter if the employee who passed out the garments was a garment worker or a receptionist or a bookkeeper. The time is compensable because the employer required the employee to perform that task.

The Department of Labor regulations clearly require compensation for time spent on activities that are not integral and indispensable to the worker's duties during the "regular shift." The regulations provide that donning and doffing employer-required uniforms on employer premises is compensable, regardless of whether the

---

20. This situation in which a worker engages in pre-shift activity to assist other workers was referred to in the Senate Report and in the Senate debates. S. Rep. No. 48, 80th Cong., 1st Sess. 48; 93 Cong. Rec. 2298 (remarks of Sen. McGrath and Sen Cooper), 2350 (remarks of Sen. Barkley and Sen. Cooper).

uniforms are needed to do the job. "[C]lothes-changing must be counted as hours worked if the changing of clothes is indispensable to the performance of the employee's work or *is required* by law or *by the rules of the employer.*" 29 C.F.R. § 785.26 (emphasis added).[21] Donning and doffing an employer-required uniform on the employers premises is compensable even if the uniform itself is not indispensable to whatever the employee does while wearing it.[22] If Integrity were to require warehouse workers to wear uniforms and don and doff those uniforms at the warehouse facility, that obviously would not be essential to filling orders from Amazon.com customers, yet the regulations clearly would require Integrity to pay for the time needed to put on and take off the uniforms, and indeed for waiting and walking time prior to removing the uniform.[23]

---

21. Similarly, 29 C.F.R. § 790.8(c) provides that clothes changing is compensable under section 254(a) if it is "required by law, by rules of the employer, or by the nature of the work." In discussing the Portal-to-Portal Act, Senator Cooper contrasts clothes changing required by the nature of a job with clothes changing that is "merely a convenience to the employee." 93 Cong. Rec. at 2298.

22. Integrity insists that "changing clothes would be compensable only 'if the employee could not perform his [principal] activity' without it." Pet. Br. 9 (quoting 93 Cong. Rec. 2297-98 (1947) (remarks of Sen. Cooper). The regulations expressly provide otherwise.

23. The Government also asserts that clothes changing which is required by an employer would not be compensable if the clothes lacked "a close or direct relationship to the actual performance of the employee's productive work." U.S. Br. 19. In that situation, the clothes changing would be noncompensable, in the United States' view, because it would be "indispensable" (i.e., mandated by the

29 C.F.R. § 790.6(b) provides that "[i]f an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his 'workday' commences at the time he report there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time." That regulation includes situations in which for some reason (such as a shortage of supplies) the worker will have nothing to do, but some official forgot to tell the employees not to come in that day; such inactivity would not "integral and indispensable" to anything. [24]

The regulations also require compensation for "[t]ime spent in work for public or charitable purposes at the employer's request, or under his direction or control." Participation in such charitable activities would not be integral and indispensable to the work of any employees except perhaps those who work in a company's community relations department. 29 C.F.R. § 785.44. The regulations regarding time spent on employee suggestions provides that such activity is compensable if an employee "is assigned" to do so. *See* 29 C.F.R. § 785.45.[25] An employee

---

employer) but not "integral." *Id.* The very regulation which the Government cites, however, states specifically that such employer-mandated clothes changing would be integral and compensable. 29 C.F.R. § 790.8(c) and n.65.

24. There are some positions, such as a firefighter, in which waiting to be called into action is a central part of the job. But section 790(6)(b) is not limited to such situations.

25. "Generally, time spent by employees outside of their regular working hours in developing suggestions under a general suggestion system is not working time, but if employees are

might be assigned to work on a suggestion that was not essential to his or her own tasks. Employer-required attendance at a lecture or training program counts as work time even if that lecture or training "is not directly related to the employee's job." 29 C.F.R. § 785.27. Integrity would be obligated to compensate its employees if it directed them, after the end of their shift, to attend a lecture on a topic wholly unrelated to their jobs as warehouse workers.

The Department of Labor's Field Operations Handbook provides that the Wage Hour Division will not consider as hours worked time spent on a company sports team, but only "if the participation of the employee in these activities is completely voluntary and if his/her regular employment is not conditioned upon participating in these activities." Field Operations Handbook section 31b05 (2000). If Integrity required its workers to play on a company softball team, Integrity would have to compensate the workers for the time involved, even though those sporting events would be neither integral nor indispensable to the regular duties of the employees in question.

All of these regulations concern activities that occur before a worker's paid shift begins or after that shift has ended; if the activities occurred in between, they would be compensable anyway under the continuous workday rule. If Integrity ordered Plaintiffs in this case to engage in any of those activities after they clocked out, the

---

permitted to work on suggestions during regular working hours the time spent must be counted as hours worked. Where an employee is assigned to work on the development of a suggestion, the time is considered time worked."

regulations would clearly have required compensation, even though the activities would obviously not have been integral and indispensable to filling Amazon.com orders. Yet both Integrity and the Government insist that the time spent waiting to be searched and the time spent being searched pursuant to an employer-directive are not compensable if they occur after the shift ends. It is difficult to understand how the position taken in pages 10 to 22 of the Government's brief (other than footnote 6) can be reconciled with these Labor Department regulations.

B. This Search Is Neither Walking Under Section 254(a)(1) Nor Preliminary and Postliminary Activity Under Section 254(a)(2)

Section 254(a)(1) precludes FLSA claims for time spent "walking . . . to and from the actual place of performance of the principal activity or activities." Section 254(a)(2) bars such claims for "activities which are preliminary to or postliminary to said principal activity or activities." The regulations regarding section 254(a)(2) delineate two types of activities that would be preliminary or postliminary: First, activities undertaken by a worker for his personal convenience, 29 C.F.R. § 790.8(c), and second, activities related to the compensation process, such as checking in and out or waiting in line to receive pay checks. 29 C.F.R. § 790.7(g). Neither section 254(a)(1) nor section 254(a)(2) apply to the search in this case.

(1) Integrity suggests that participation in the search (and the related waiting) is rendered noncompensable

by section 254(a)(1), which bars compensation claims for "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities," unless that travel occurs during the continuous workday.[26] Integrity asserts that inching forward in a long waiting line, and stepping through a metal detector, constitute "walking" within the exclusion of section 254(a)(1). A 25-minute period during which an employee moves a few yards would more aptly be described as standing in line, waiting, rather than walking to the exit. The target of the employee's slow shuffle is not the exit, but the metal detector used to search the employee.

In any event, as with waiting, the compensability of walking (if the circumstances of this case could fairly be described as "walking") depends on what an employee is walking to and from. Walking to a time clock is not compensable. But *IBP* held that time walking between a work station and the place where an employee doffs protective gear *is* compensable.[27] *IBP*, 546 U.S. at 33-40. And the regulations make clear that section 254(a)(1) does not preclude compensation if an employee was

---

26. "Waiting in line for a security screening is indistinguishable from many other tasks that have been found non-compensable under the FLSA, such as . . . walking from the parking lot to the workplace . . . . *See* 29 C.F.R. § 790.7(f)-(g) . . . . Indeed, time spent waiting to clear security is indistinguishable from time spent walking between the time clock and the work station that was . . . squarely addressed in the Portal-to-Portal Act." Pet. Br. 16-17.

27. Integrity's argument that "a reasonable amount of waiting time" at the beginning or end of the day is always noncompensable is incorrect. Pet. Br. 26. Waiting that occurs prior to the last principal activity is compensable no matter how reasonable the length of time involved.

required to engage in some work activity while traveling. "An employee who walks, rides or otherwise travels while performing active duties is not engaged in the activities described in section [254(a)]." 29 C.F.R. § 790.7(d). "Any work which an employee is required to perform while traveling must, of course, be counted as hours worked." 29 C.F.R. § 785.41. An employee who after leaving his or her main work area "transport[s] equipment to a central location" U.S. Br. 31-32 n.18, would be necessarily be traveling; yet, as the government correctly observes, that activity would be compensable. Stepping through a metal detector (and waiting to do so) is not "indistinguishable" from walking to a time clock merely because both activities involve walking, any more than on it would be indistinguishable from walking to a guard station to turn in equipment or a report. The mere fact that the activity in this case arguably involved walking does not establish that it is noncompensable.

(2) Integrity and the Government rely on the regulations which provide that checking in and out, such as by punching in and out at a time clock, are ordinarily noncompensable under the Portal-to-Portal Act. 29 C.F.R. §§ 785.24, 790.8(g). They assert that being searched "is just the modern equivalent . . . of punching the clock." Pet. Br. 26; Gov't Br. 24. But punching in and out is fundamentally different from being searched. The considerations that render clocking in and out noncompensable are not present in the case of a search for stolen warehouse inventory.

The usual purpose of punching in and out is to collect information related to compensation, to create a record[28] of

---

28. *See* U.S. Br. 25: "A requirement to check in and out may also be driven by the employer's reasonable desire to have a *record*

when a particular employee entered and left the location of the time clock, usually to provide a basis for determining how long the employee was on the job and how much the employee should be paid. A search has none of those elements. A guard who conducts a search would not usually make a record of who was searched or when; the facts set out in the complaint do not suggest any such thing occurred here. A guard ordinarily would not care which employee he or she had searched or when. Air travelers readily distinguish "checking in" at an airport ticket counter from being searched (or otherwise screened) by the Transportation Security Agency. Integrity fails to explain what checking (or punching) out has in common with being searched, other than that (like the doffing of safety gear in *IBP*) they both occur after a worker has completed his or her shift but before leaving the facility.

The Government argues that in at least some cases a time clock (or other checking in and out) "could be characterized as an 'anti-theft measure,' making it like a search, because checking in and out would make inaccurate reporting of hours less likely." U.S. Br. 24. It is possible, the government notes, that a "supervisor inaccurately recorded [the worker's] hours." *Id.* The government is hypothesizing an employer which ordinarily relies on supervisor-created notes about how long each employee work, but suspects that the supervisor is falsifying those records to obtain undeserved wages for an employee, and therefore installs a time clock to double check the supervisor's records. It seems exceedingly unlikely that the framers of the regulation in question had in mind such

---

for various purposes, of who is on the premises at any given time." (Emphasis added).

a highly atypical case; surely, that is not checking in and out "under the conditions normally present." 29 C.F.R. § 790.7(g).

The government suggests that checking out might involve a guard "who checks an employee's identity" and notes that the employee is leaving. U.S. Br.23. Such a quasi-investigatory act by a guard, it argues, would not be all that different from looking into an employee's purse or briefcase. U.S. Br. 24. But while checking out might occasionally involve giving one's name to a guard, or filling out a log sheet maintained by a guard, guards in such situations do not ordinarily "check[] an employee's identity," to make sure the departing individual is the employee he or she claims to be. In those rare instances in which a guard might be assigned to confirm the identity of each departing worker, such as scrutiny of departing prison guards to make sure that none was an inmate masquerading as a guard, it seems unlikely that the official responsible for checking identities would also be asked to do the work of time clock.

The government appears to suggest that a search is like (or part of) checking out because it happens when the worker is leaving, occurs near the door, and does not take very long; being searched is merely "part of the process of departing the premises" or "ancillary to departing the premises." U.S. Br. 24, 25. But neither the statute nor the regulations deny compensation to principal activities if they occur while a worker is in "the process of departing the premises." It is difficult to reconcile this suggestion with the government's acknowledgement that "if employees were required to complete paperwork about what they had done during

their shift, or obtain assignments for the next shift, such activities would generally be compensable." U.S. Br. 31-32 n.18. If a worker's supervisor stood next to the door, and there received reports or made assignments for the next day, one might describe those end-of-day activities as "ancillary to departing the premises," but they would still be compensable.

Checking out is ordinarily non-compensable because it is part of the process through which compensation is calculated and provided to a worker (like picking up a paycheck), not one of the tasks a worker may be ordered to do to earn that compensation. The basic arrangement between employer and employee is that the employee agrees to engage in activities required by the employer, in return for which the employer provides the worker with compensation. The employer benefit to which *Tennessee Coal* refers are the benefits from those required services. The compensation side of this arrangement will often involve some employee action, such as documenting when he or she was at work or going to pick up a paycheck, and in some situations the employer will require the worker to do that in a particular manner, such as by using a punch clock. Similarly, an employer might require a worker as a condition of enrolling in its health care plan to come to the HR office and fill out a form. But the primary beneficiary of these compensation-related activities are to the employee, and the incidental benefits to the employer—such as the increased administrability of the compensation scheme—are not the benefits with which *Tennessee Coal* is concerned.

C. The Standards Proposed By Integrity And The Government Are Legally Incorrect And Would Lead To Untenable Results

(1) The Government suggests that an employer only has to pay for pre- or post-shift activities that are "directly related" to the work that was done during the paid shift. Gov't Br. 11.[29] That contention is plainly inconsistent with footnote 6 in the Government' brief, which acknowledges that under the Department's regulations employee participation in an employer-required training is compensable "even if the training did not relate directly" to the worker's regular work. U.S. Br. 21 n.6. And it is at odds with the decision in *Dunlop v. City Electric, Inc.*, where the court held, at the behest of the Secretary of Labor, that employees' pre-shift activities "performed at their employer's behest and for the benefit of the business" are principal activities. *Dunlop v. City Electric, Inc.*, 527 F.2d 394, 491 (5th Cir. 1976). "It is irrelevant whether fueling and unloading trucks is 'directly related' to the business of [the electricians in question]; what is important is that such work is necessary to the business and is performed by the employees for the benefit of the employer, in the ordinary course of that business." *Id.*

---

29. *See also,* U.S. Br. 8 ("the anti-theft screenings . . . were not closely intertwined with their principal activity of filling orders in the warehouse"), 10 ("[p]etitioner's screenings were not integral and indispensable to the work performed by its warehouse employees"), 11 ("An Otherwise "Preliminary" Or "Postliminary" Activity Must Be Closely Related To An Employee's Principal Activities To Be Integral And Indispensible To Them."), 13 ("a compensable activity is one that bears a close or direct relationship to an employee's principal activities.").

More seriously, such a rule would legalize wholesale evasion of the FLSA overtime requirements. Employers could routinely require workers to work off the clock so long as the required pre- and post-shift activity was not "closely and directly related" or "integral and indispensable" to what the employees did during their shift. At almost every employer there will be tasks that would fit within this loophole. A warehouse worker could be required to mow the lawn or wash the boss's car. A receptionist could be directed to come in early to make coffee or tend to the office plants. That result obviously is not what the FLSA, the Portal-to-Portal Act or the Labor Department regulations provide.

(2) Integrity advances a somewhat more stringent version of the government's proposed "closely related" standard, insisting that pre- and post-shift work is only compensable if it is integral and indispensable to the employee's "primary" duties.[30] A court administering this standard would apparently review what a worker did during the (usually forty) hours for which he or she was being paid, and determine which of those duties were his or her "primary" or "principal" job tasks.[31] The employer would only have to pay an employee for required post-shift work that was integral and indispensable to those primary job duties, and but would not have to pay the employee for

---

30. "[The proper] inquiry [is] whether the task is integral and indispensable to an employee's *principal job duties*." Pet. Br. 36 (emphasis in original); *see* Pet. Br. 2 ("primary job duties"), 17 ("principal job functions"), 18 ("principal job activities").

31. *See* 29 C.F.R. § 790.b(a) ("The use by Congress of the plural form 'activities' in the statute makes it clear that in order for an activity to be a 'principal' activity, it need not be predominate in some way over all other activities engaged in by the employee in performing his job . . . .").

post-shift work if the paid task to which it was integral and indispensable was merely a secondary job duty. For example, if an employee at a meat packing plant spent 38 hours a week cleaning and packaging carcasses, and only 2 hours a week butchering the animals, the employer would not have to pay the employee for time spent sharpening the knives needed for that butchering, because it would not be integral and indispensable to the worker's "principal job function." *But see Mitchell v. King Packing Co.*, 350 U.S. 260 (1956).

(3) Integrity[32] and the Government[33] advance another variant of this standard, asserting that pre- and post-

---

32. Pet. Br. 16 ("the activity in question must be so integral and indispensable to the employee's *productive work* as to be counted among the employee's principal activities.") (emphasis in original), 19-20 ("What matters is whether the task is integral and indispensable to the employee's *productive work*.") (emphasis in original), 22-23 ("An employee's 'principal activities,' . . . include 'work of consequence performed for an employer' and activities that are 'indispensable to the performance of productive work.' 29 C.F.R. § 790.8(a)"), 36 ("the FLSA will apply only to activities that are part and parcel of employees' productive work."), 39 ("The principal activities for which an employee must be compensated include 'work of consequence' performed for the employer and activities that are 'indispensable to the performance of productive work.' 29 C.F.R. § 790.8(a). Here, Respondent's 'work of consequence' and 'productive work' involved *filling customer orders* ")(emphasis in original), 39 ("What matters is whether the activity is 'integral and indispensable[']' to the employees' principal *productive work*.").

33. U.S. Br.8 ("Th[e] screenings were required by the employer . . . . But the regulations and this Court's cases required that the activity be 'integral and indispensable' to the employee's productive work . . . ."), 21 ("th[e] screenings do not have a close connection to the performance of the employees' productive work in the warehouse").

shift activity is compensable under section 254(a) only if it is integral and indispensable to the employee's "productive work." In addition to permitting compulsory unpaid work that is unrelated to work done during an employee's shift, this would also permit compulsory unpaid work that was integral and indispensable to shift work if the court concluded that the related shift work itself was not "productive." Integrity appears to suggest that participating in the search in this case was not compensable as such because (on its view) doing so was not "productive work."

But the FLSA refers without limitation to "work" and "workweek", not to work or workweeks that are productive. The regulations classify as compensable work employer-required activities that would not readily be characterized as productive work. *See Reich v. New York City Transit Authority*, 45 F.3d 646, 650-51 (2d Cir. 1995). And the term "productive work" is obviously subjective. In some sense, Integrity must have considered the searches productive, or it would not have spent the money to buy metal detectors and pay screeners in the first place. "Many retail employers use employee security screenings, including employee bag searches, as a loss prevention method." Amicus National Retail Federation ("NRF") Br. 4. In any event, interpreting the FLSA to require overtime pay only for work that is "productive work," or is integral and indispensable to "productive work," would lead to intractable problems and disputes.

Unproductive work is a regrettably common occurrence. Workers waste countless hours every day attending unproductive meetings, reading and writing unproductive memos, and discussing unproductive ideas.

Workers are often required to engage in activities whose purpose is not to produce anything, but merely to prevent something from going wrong. If an employee refused to perform a task assigned by the employer solely because the employee believed it would be unproductive, the employee would be fired for insubordination, and rightly so. Work often is recognized as having been unproductive only long after it was performed. Congress assuredly did not intend that a worker's right to compensation turn on such distinctions.

(4) Each of the standards proposed by Integrity would undermine the core purpose of the FLSA overtime requirement, by permitting an employer in a variety of circumstances to unpaid require pre- and post-shift work. Under all of them

> [a]n employer could impose significant, time-consuming duties on the employee to be performed . . before and after the main body of the workday and be exempted from payment for those duties because they were not sufficientiy related to the employee's principal duties performed during the workday. [S]uch an interpretation would exaggerate the effect of the Portal-to-Portal exemptions, and would substantially undermine the purposes of the Fair Labor Standards Act by creating loopholes capable of significant abuse.

Reich v. New York City Transit Authority, 45 F.3d at 650-51. Indeed, many of these formulations would appear to permit the abuse that was at the very core of the

FLSA overtime provision, requiring workers (before or after their paid shift) to do more of the same work they perform during the shift. A worker's ability to engage in most shift work—filling orders, washing dishes, making widgets—does not depend on whether he does more of the same before or after that shift. A warehouse worker would be able to fill orders between 9 and 5 even if he had not filled other orders (without pay) from 8 to 9 that morning or from 5 to 6 the previous afternoon.

III. The Purpose of the FLSA (Untouched By The Portal-to-Portal Act) Is Not Only To Compensate Workers For Working More Than 40 Hours In A Workweek, But Also To Encourage Employers To Implement Efficiencies And Spread Work In Order To Reduce Employee Overtime

Although Integrity and amicus NRF complain about the cost of compliance with the FLSA if search time is declared compensable, they both understand that the cost involved would be only the modest expense of making the search process sufficiently efficient that the search and related waiting time become *de minimis*. Integrity could simply hire additional screeners or stagger the shift times to eliminate the waiting period that consumes most of the worker time at issue in this case. Creating an incentive for such measures is well within the purpose of the FLSA. The goals of section 7 were not only to compensate workers if they had to work more than 40 hours in a week, but also to motivate employers to adopt measures that would shorten the employee's workweek to 40 hours, such as hiring additional workers rather than burden their existing workforce.

> By this requirement [of compensation for overtime at one and one-half times the normal hourly rate], although overtime was not flatly prohibited, financial pressure was applied to spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act. In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work. Reduction of hours was a part of the plan from the beginning. "A fair day's pay for a fair day's work" was the objective stated in the Presidential message which initiated the legislation. That message referred to a 'general maximum working week', "longer hours on the payment of time and a half for overtime" and the evil of "overwork" as well as "underpay." The message of November 15, 1937, calling for the enactment of this type of legislation referred again to protection from excessive hours. [The] Senate Report . ., the companion House Report and the Conference report all spoke of maximum hours as a separately desirable object.

Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 577-78 (1942) (internal footnotes omitted). The passage of the Portal-to-Portal Act did not change that legislative purpose. *See* 29 C.F.R. § 790.2. *Bay Ridge Operating Co. v. Aaron*, reiterated that the purpose of section 7 "was to compensate those who labored in excess of the statutory maximum number of hours for the wear and tear of

extra work and to spread employment through inducing employers to shorten hours because of the pressure of extra cost ...." *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948). But if, as Integrity maintains, the search and related waiting times are noncompensable, Integrity can skimp on hiring more screeners, deploying more metal detectors and using other line-shortening and time-saving devices or techniques, and instead waste as much of the workers' time as it pleases.

IV. The Court Should Not Adopt A Per Se Rule Regarding Whether "Security Screening" Is Work Under The FLSA Or A Principal Activity Under The Portal-to-Portal Act

Integrity urged this Court to grant review in this case to adopt a "uniform rule" regarding the compensability of "security screenings." Pet. Br. 42. But the definition of work under the FLSA and the contours of the exclusions in section 254(a) are too complex to permit a per se rule in this area, and the practices that might be characterized as "security screenings "take a variety of forms [a]nd serve a variety of purposes." Pet. Br. 43; *see* 29 C.F.R. § 790.7(b) ("Activities which under one set of circumstances may be 'preliminary' or 'postliminary' activities, may under other conditions be 'principal' activities.").

The phrase "security screening" is not part of the text of the FLSA, the Portal-to-Portal Act, or any of the regulations interpreting those statutes. It is far from clear what types of practices would be encompassed by a per se rule regarding "security screenings." The term "security" suggests that the purpose of such a practice would be to stop some deliberately harmful or otherwise

illegal action, such as by preventing a dangerous person (a terrorist or thief) or object (a gun or a bomb) from entering a building, or preventing the forbidden departure of something (a dangerous substance) or someone (an inmate). But a person might be scrutinized on entry to avoid an unintended accident (excluding matches from a munitions factory) or on departure to determine if an accident had occurred (monitoring for radioactive contamination of the clothes of a nuclear plant worker). Upon entering the work site, workers might be checked to ensure that they had not inadvertently forgotten to bring something to work, or upon leaving, to confirm they were not inadvertently taking something home (e.g., the keys to a company truck). Access to a building might be limited merely to avoid gawking tourists in the hall, or to prevent non-customers from using the restrooms. These purposes might or might not be described as involving security. If an employer adopted a practice for several reasons, a court would have to decide how to resolve a mixed motive case.

It is also unclear what action would constitute a "screening." "Screening" suggests a relatively brief and unintrusive process of scrutiny which a person must complete before being permitted to enter or leave a building. But what if a departing worker were required to submit to a search of the contents of his or her locker, car, or cell phone, or to take a polygraph test regarding whether he or she had stolen anything? A pharmaceutical company concerned that workers were using narcotics available in a plant might order employees, prior to leaving, to submit a blood or urine sample. In the wake of the theft of a valuable item from a particular department, each worker in that unit might be subjected at the end of his or her shift to a detailed and aggressive interrogation by company

officials. Not all of those practices would necessarily be described as mere "screening"; at some point "screening" becomes a euphemism for an investigation.

Furthermore, the sort of per se rule urged by Integrity is not necessary to avoid calling into question most typical security practices. In many circumstances, overtime claims related to ordinary security screenings will be precluded by the *de minimis* doctrine. If a worker punches out on a time clock and is able to promptly walk through a metal detector and out the door, the screening itself would take only a moment, and would not give rise to a colorable claim under the FLSA. Integrity dismisses the idea of a *de minimis* exception to FLSA claims as "barely adumbrated" Pet. Br. 35-36 n.8, as if this were some novel and inchoate legal concoction. To the contrary, "the roots of the *de minimis* doctrine stretch to ancient soil, [and] its application in the context [of the FLSA] began with [the 1944] decision in [*Mt.Clemens*]." *Sandifer v. US Steel*, 134 S.Ct. at 880.[34] The *de minimis* doctrine has for

34. *Mt. Clemens*, 328 U.S. at 692:

> The workweek contemplated by s 7(a) must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved. The *de minimis* rule can doubtless be applied to much of the walking time involved in this case, but the precise scope of that application can be determined only after the trier of facts makes more definite findings as to the amount of walking time in issue.

decades been an established part of FLSA jurisprudence. *See* 29 C.F.R. § 785.47; 1 Ellen Kearns, ed., The Fair Labor Standards Act (2d ed. 2010), 8-81 to 8-93 (citing cases). In a number of cases, employers have asserted the *de minimis* doctrine as a defense to an overtime claim based on a security screening.[35]

Many security screenings also fall outside the FLSA because they are directed at the public as a whole, not at employees. In the common situation in which everyone entering a government building, including members of the general public, is required to go through a metal detector, that requirement could not fairly be described as an obligation imposed by the government agency on its employees. This is, rather, a requirement imposed on everyone by the agency acting as the proprietor of the premises, not acting as an employer, which incidentally affects employees only because they are being treated like everyone else.[36] If a TSA worker going on vacation had to pass through security at an airport, no one would say that the vacationer had been required to do so by his or her employer, even though TSA is operating that screening system. In that type of circumstance, participating in a search would not be work within the scope of *Tennessee Coal* or the FLSA.

---

35. *E.g., Alvarado v. Costco Wholesale Corp.*, 2008 WL 2477393 at *3-84 (N.D. Cal. June 18, 2008); *Whalen v. United States*, 93 Fed.Cl. 579, 601 n.26 (Fed. Cl. 2010).

36. An employer could not "evade its FLSA obligations by allowing an occasional visitor on the premises, subject to a requirement that almost always applies to employees only." U.S. Br. 30.

In many instances, security screening is either directed at everyone entering the premises, or is actually intended for non-employees, with employees being affected only incidentally. Employees may be given special passes (or use of separate entrances) as a convenience to permit them to avoid the more rigorous and time-consuming screening practices imposed on members of the general public; screening at the employee entrance may be limited to steps needed to assure that members of the public are not using that particular door. *Bonilla v. Baker Concrete Construction, Inc.*, 487 F.3d 1340, 1345 (11th Cir. 2007) (employee access card system used to prevent members of the public from accessing airport tarmac.). In many cases involving security screenings by the government, the screening at issue was directed at the public at large. *See* Pet. Br. at 31, 37; *see also, Ceja-Corona v. CVS Pharmacy, Inc.*, 2013 WL 3282974 (E.D. Cal. July 2, 2013) (discussing the differences between the security screenings in this case and those in *Gorman v. Consolidated Edison* and *Bonilla v. Baker Concrete Services, Inc.* in light of the decision of the Court of Appeals in *Busk v. Integrity Staffing Solutions, Inc.*).

In some instances a search would not be a job requirement at all. An employer could, for example, prohibit employees from bringing bags to work; it might instead, as a convenience to the workers, permit bags, but only provided that workers who do bring bags will be subject to a bag search on the way out. In that circumstance the search would be not a job requirement, but a condition of an employer-afforded convenience; a worker would be free to avoid the search simply by choosing not to bring a big

to the plant or office.[37] That would be analogous to a plant at which the employer for the convenience of employees provided (but did not require use of) work clothes, on the condition that at the end of the day a worker could not leave his or her dirty work clothes on the changing room floor, but would have to return them to a laundry room. But in the search in this case was not merely the condition appurtenant to such an employer-afforded convenience; it was a job requirement.

CONCLUSION

This action was occasioned by an uncommon problem, a post-shift search process conducted so inefficiently that employees at Amazon.com warehouses allegedly waited 25 minutes each day before they could leave the building where they worked. None of the amici supporting Integrity asserts that it, or even a single one of its members, engages in a similar practice. Integrity does not contend that such time consuming searches are or ever were standard practice at the nation's plants and offices. No one suggests that warehouses and stores could not survive if they had to avoid this sort of delay. Wasting worker time in understaffed post-shift searches is not essential to the financial viability of Amazon.com or any other employer; it is just a little bit cheaper.

---

37. *See Frlekin v. Apple, Inc.*, 2014 WL 2451598 at *4 (N.D.Cal. May 30, 2014); *Alvarado v. Costco Wholesale*, 2008 WL 2477393 at *3 (N.D. Cal. June 18, 2008). Workers who did not bring bags should be allowed to use a separate line so that they do not have to wait for the bag check of others.

Integrity reports that the decision below has spawned 13 nationwide class-action[38] lawsuits against Amazon.com and its staffing companies. Pet. Br. 46-47. But that pattern reflects only different plaintiffs and lawyers attempting to bring the same basic lawsuit on behalf of the same workers against the same company and its affiliates. Integrity notes with alarm that in litigation against Amazon.com and its staffing companies "the putative class includes more than 400,000 plaintiffs." Pet. Br. 47. But Congress did not choose to exempt the nation's largest companies from the obligations imposed on smaller employers by the Fair Labor Standards Act. And Congress did not provide that employers which deny legally required overtime payments to many thousands of workers should be entitled on that account to greater solicitude than would be accorded to employers which violate the rights of only a handful of victims.

Integrity suggests that a requirement that employees work several hours a week without pay is merely among that "factors that employees must weigh and consider in choosing whether to take a particular job." Pet. Br. 45. Top ranked graduates of the nation's most prestigious law schools may have the luxury of "weigh[ing]" and "consider[ing]" such "factors" in choosing whether to take a particular job. But tens of millions of less fortunate workers have to take any job they can get. The Fair Labor Standards Act was intended to protect the working conditions of those who lack the bargaining power in the labor market to protect themselves.

---

38. An FLSA lawsuit seeking relief for a large number of employees is a collective action, not a class action. If any of the lawsuits referred to by Integrity are class actions, the class claim would be based on state law.

For the above reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

MARK R. THIERMAN
Counsel of Record
JOSHUA D. BUCK
THIERMAN LAW FIRM, P.C.
7287 Lakeside Drive
Reno, Nevada 89511
(775) 284-1500
mark@thiermanlaw.com

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

Counsel for Respondents

APPENDIX

APPENDIX

REGULATIONS INVOLVED

1. 29 C.F.R. §785.7 provides:

> **Judicial Construction.** The United States Supreme Court originally stated that employees subject to the act must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." (*Tennessee Coal, Iron & Railroad Co.* v.*Muscoda Local No. 123,* 321 U. S. 590 (1944)) Subsequently, the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer, that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." (*Armour & Co.* v. *Wantock,* 323 U.S. 126 (1944); *Skidmore* v. *Swift,* 323 U.S. 134 (1944)) The workweek ordinarily includes "all the time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place". (*Anderson* v. *Mt. Clemens Pottery Co.*,328 U.S. 680 (1946)) The Portal-to-Portal Act did not change the rule except to provide an exception for preliminary and postliminary activities. See § 785.34.

Appendix

2. 29 C.F.R. § 785.16(a) provides:

> **Off Duty.** (a) *General.* Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.
>
> (b) *Truck drivers; specific examples.* A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period. If the driver reaches his destination and while awaiting the return trip is required to take care of his employer's property, he is also working while waiting. In both cases the employee is engaged to wait. Waiting is an integral part of the job. On the other hand, for example, if the truck driver is sent from Washingtion, DC to New York City, leaving at 6 a.m. and arriving at 12 noon, and is completely and specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip the idle time is not working time. He is waiting to be engaged. (*Skidmore* v. *Swift,* 323 U.S. 134, 137 (1944); *Walling* v. *Dunbar Transfer & Storage,* 3 W.H. Cases 284; 7 Labor Cases para. 61,565 (W.D. Tenn. 1943); *Gifford* v. *Chapman,* 6 W.H.

Cases 806; 12 Labor Cases para. 63,661 (W.D. Okla., 1947); *Thompson* v. *Daugherty,* 40 Supp. 279 (D. Md. 1941))

3. 29 C.F.R. § 785.19 provides:

Meal. (a) *Bona fide meal periods.* Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. (*Culkin* v. *Glenn L. Martin, Nebraska Co.,* 97 F. Supp. 661 (D. Neb. 1951), aff'd 197 F. 2d 981 (C.A. 8, 1952), cert. denied 344 U.S. 888 (1952); *Thompson* v. *Stock & Sons, Inc.,* 93 F. Supp. 213 (E.D. Mich 1950), aff'd 194 F. 2d 493 (C.A. 6, 1952); *Biggs* v. *Joshua Hendy Corp.,*183 F. 2d 515 (C. A. 9, 1950), 187 F. 2d 447 (C.A. 9, 1951); *Walling* v. *Dunbar Transfer & Storage Co.,* 3 W.H. Cases 284; 7 Labor Cases para. 61.565 (W.D. Tenn. 1943); *Lofton* v. *Seneca Coal and Coke Co.,* 2 W.H. Cases 669; 6 Labor Cases para. 61,271 (N.D. Okla. 1942); aff'd 136 F. 2d 359 (C.A. 10, 1943); cert. denied 320 U.S. 772 (1943); *Mitchell* v. *Tampa Cigar Co.,*36 Labor Cases para. 65, 198, 14 W.H. Cases 38

(S.D. Fla. 1959); *Douglass* v. *Hurwitz Co.*,145 F. Supp. 29, 13 W.H. Cases (E.D. Pa. 1956))

(b) *Where no permission to leave premises.* It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

4. 29 C.F.R. § 785.23 provides:

Employees residing on employer's premises or working at home. An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home. (*Skelly Oil Co.* v. *Jackson,* 194 Okla. 183, 148 P. 2d 182 (Okla. Sup. Ct. 1944; *Thompson* v. *Loring Oil Co.*, 50 F. Supp. 213 (W.D. La. 1943).)

5. 29 C.F.R. § 785.26 provides:

> **Section 3(o) of the Fair Labor Standard Act** Section 3(o) of the Act provides an exception to the general rule for employees under collective bargaining agreements. This section provides for the exclusion from hours worked of time spent by an employee in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee. During any week in which such clothes-changing or washing time was not so excluded, it must be counted as hours worked if the changing of clothes or washing is indispensable to the performance of the employee's work or is required by law or by the rules of the employer. The same would be true if the changing of clothes or washing was a preliminary or postliminary activity compensable by contract, custom, or practice as provided by section 4 of the Portal-to-Portal Act, and as discussed in § 785.9 and part 790 of this chapter.

6. 29 C.F.R. § 785.27 provides:

> **General** Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:
>
> (a) Attendance is outside of the employee's regular working hours;

(b) Attendance is in fact voluntary;

(c) The course, lecture, or meeting is not directly related to the employee's job; and

(d) The employee does not perform any productive work during such attendance.

7. 29 C.F.R. § 785.28 provides:

Involuntary attendance. Attendance is not voluntary, of course, if it is required by the employer. It is not voluntary in fact if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance.

8. 29 C.F.R. § 785.29 provides:

Training directly related to employee's job. The training is directly related to the employee's job if it is designed to make the employee handle his job more effectively as distinguished from training him for another job, or to a new or additional skill. For example, a stenographer who is given a course in stenography is engaged in an activity to make her a better stenographer. Time spent in such a course given by the employer or under his auspices is hours worked. However, if the stenographer takes a course in bookkeeping, it may not be directly related to her job. Thus, the time she spends voluntarily in taking such a bookkeeping course, outside of regular working

hours, need not be counted as working time. Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job, the training is not considered directly related to the employee's job even though the course incidentally improves his skill in doing his regular work.

9. 29 C.F.R. § 785.30 provides:

Independent training Of course, if an employee on his own initiative attends an independent school, college or independent trade school after hours, the time is not hours worked for his employer even if the courses are related to his job.

10. 29 C.F.R. § 785.31 provides:

Special situations. There are some special situations where the time spent in attending lectures, training sessions and courses of instruction is not regarded as hours worked. For example, an employer may establish for the benefit of his employees a program of instruction which corresponds to courses offered by independent bona fide institutions of learning. Voluntary attendance by an employee at such courses outside of working hours would not be hours worked even if they are directly related to his job, or paid for by the employer.

Appendix

11. 29 C.F.R. § 785.43 provides:

> **Medical Attention.** Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked.

12. 29 C.F.R. § 785.44 provides:

> **Civic and charitable work.** Time spent in work for public or charitable purposes at the employer's request, or under his direction or control, or while the employee is required to be on the premises, is working time. However, time spent voluntarily in such activities outside of the employee's normal working hours is not hours worked.

13. 29 C.F.R. § 785.45 provides:

> **Suggestion systems.** Generally, time spent by employees outside of their regular working hours in developing suggestions under a general suggestion system is not working time, but if employees are permitted to work on suggestions during regular working hours the time spent must be counter as hours worked. Where an employee is assigned to work on the development of a suggestion, the time is considered time worked.

REPLY BRIEF

No. 13-433

In the
Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC.,

Petitioner,

v.

JESSE BUSK and LAURIE CASTRO, on behalf of themselves and all others similarly situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

NEIL M. ALEXANDER
RICK D. ROSKELLEY
ROGER L. GRANDGENETT II
CORY GLEN WALKER
LITTLER MENDELSON
3960 Howard Hughes Parkway, Suite 300
Las Vegas, NV 89169
(702) 862-8800

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
BARBARA A. SMITH
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

September 3, 2014

CORPORATE DISCLOSURE STATEMENT

Petitioner Integrity Staffing Solutions, Inc. does not have a parent corporation, and no publicly traded corporation owns 10% or more of its stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

REPLY BRIEF 1

ARGUMENT 4

I. This Court Should Reject Respondents' Attempt To Evade The Longstanding "Integral And Indispensable" Test. 4

A. Respondents' Proposed Alternative Test Is Inconsistent With the Portal-to-Portal Act and This Court's Precedents. 5

B. DOL's Regulations Do Not Remotely Suggest That All Activities "Required" by the Employer Are Compensable. 9

C. Respondents' Interpretation of the Portal-to-Portal Act Would Dramatically Expand the Scope of Compensable Activities. 14

D. Respondents' Attempts To Disavow the Implications of Their Arguments Are Unavailing. 16

II. Respondents Badly Misconstrue The Meaning Of "Principal Activities." 18

III. *Amici* Fail To Show That Post-Shift Security Screenings Are Integral And Indispensable To Respondents' Principal Job Duties. 21

IV Respondents' Policy Arguments Are Unavailing. 23

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

American Broadcasting Cos. v. Aereo,
134 S. Ct. 2498 (2014) 24

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 680 (1946) ..... *passim*

Barrentine v. Arkansas-Best Freight,
750 F.2d 47 (8th Cir. 1984) 9

Christopher v. SmithKline Beecham,
132 S. Ct. 2156 (2012) 25

Dunlop v. City Electric,
527 F.2d 394 (5th Cir. 1976) 9

IBP v. Alvarez,
546 U.S. 21 (2005) 11, 24

Kellar v. Summit Seating,
664 F.3d 169 (7th Cir. 2011) 9

Mitchell v. King Packing,
350 U.S. 260 (1956) 2, 8

Steiner v. Mitchell,
350 U.S. 247 (1956) 1, 6, 7, 8

Tennessee Coal v. Muscoda,
321 U.S. 590 (1944) 15, 22

Statute and Regulations

29 U.S.C. § 254(a) 1, 5, 19

29 C.F.R. § 553.221 10

29 C.F.R. § 790.6 ..... 10, 19

29 C.F.R. § 790.7 ..... 1, 10, 14

29 C.F.R. § 790.8 ..... *passim*

REPLY BRIEF

The Portal-to-Portal Act of 1947 expressly makes non-compensable pre-shift and post-shift travel time and other "activities which are preliminary to or postliminary to" an employee's principal productive activities. 29 U.S.C. § 254(a). There is an exception to the general rule for those pre- or post-shift activities that are so "integral and indispensable" to "the principal activities for which covered workmen are employed" that they can be fairly treated as part and parcel of the employee's principal activities. *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). The security screenings at issue here are a paradigmatic example of a non-compensable "postliminary" activity. Like the process of checking out—which has long been deemed non-compensable, *see* 29 C.F.R. § 790.7(g)—the screenings are merely part of the egress process, and are neither "integral" nor "indispensable" to Respondents' principal job duties of filling customer orders in Amazon.com warehouses. In holding to the contrary, the Ninth Circuit essentially revived the legal rule from *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946); that Congress *overturned* when it enacted the Portal-to-Portal Act.

Respondents appear to have abandoned any argument that the security screenings actually satisfy the "integral and indispensable" test, which was the basis for the Ninth Circuit's decision. Pet.App.10-13. Instead, Respondents now argue that there is an alternative route through which preliminary and postliminary activities can be deemed compensable despite the clear command of the Portal-to-Portal Act. Respondents contend that such activities are

compensable if they are *either* "integral and indispensable" to principal activities *or* required by the employer and done for the employer's benefit. In other words, while the Ninth Circuit employed a required-by-and-for-the-benefit-of-the-employer test as a flawed means for determining whether an activity was "integral and indispensable," *see* Pet. Br. 33-38, Respondents would convert that flawed test into an independent means for treating preliminary and postliminary activities as compensable, even when they are *not* integral and indispensable to principal activities.

Respondents' novel argument suffers all the flaws of the Ninth Circuit's approach, and is even more flatly contrary to the statutory text and this Court's precedents. The statutory text plainly states that preliminary and postliminary activities are non-compensable, and does not so much as hint that the substantial universe of employer-mandated preliminary and postliminary activities are exempted. Moreover, both *Steiner* and *Mitchell v. King Packing*, 350 U.S. 260 (1956), involved activities that were "required" by the employers for the employers' benefit, yet the Court applied the integral and indispensable test to determine whether they were compensable.

Respondents also cite various DOL regulations in support of their theory, but the cited regulations merely *apply* the integral and indispensable test to certain types of activities and do not remotely suggest an alternative route to compensability. DOL has already made clear that its regulations foreclose the Ninth Circuit's simplistic view that any activity required by an employer for its benefit is "integral and

indispensable." *See* U.S. Br. 19-25. The regulations equally foreclose Respondents' novel argument that anything "required" or "directed" by an employer and done for the employer's benefit is *per se* compensable, even when it is not integral and indispensable to principal activities.

Respondents suggest that, if Integrity were to prevail, employers would have free rein to force their employees to cut the lawn, wash the employer's car, or perform numerous other tasks before or after their shifts without pay. But those arguments rest on a fundamentally mistaken conception of the Portal-to-Portal Act in general and "principal activities" in particular. As Respondents themselves acknowledge, the Portal-to-Portal Act did not attempt to redefine "work" or "workweek" for all FLSA purposes. The Act's more modest goal was to make clear that courts had gone too far in imposing massive retroactive liability for travel and walking time and other preliminary and postliminary activities. The concept of "principal activities" is not a general-purpose test for identifying compensable work, but a specialized test for determining which arguably preliminary and postliminary activities are nonetheless compensable. Thus, for activities such as cutting the lawn or washing a car—which are not even arguably preliminary or postliminary—the question of whether these tasks are "principal activities" need not even arise.

Security screenings are different. While countless employees are paid to cut lawns and wash cars, no employee is paid to go through security screenings all day. Rather, going through a security screening as

part of the egress process is a quintessential postliminary activity materially indistinguishable from punching the clock (or waiting to do so) as part of the egress process. Thus, unless Respondents could somehow show that going through security is integral and indispensable to their principal activities—and Respondents have essentially given up even trying to do so—the time is non-compensable.

ARGUMENT

I. This Court Should Reject Respondents' Attempt To Evade The Longstanding "Integral And Indispensable" Test.

From the start, this case has been about the meaning of the "integral and indispensable" standard. The district court granted Integrity's motion to dismiss, holding that time spent passing through a security screening was "not integral and indispensable to [Respondents'] principal activities of employment." Pet.App.28. The Ninth Circuit reversed, holding that Respondents had stated a claim under that court's expansive interpretation of "integral and indispensable." Pet.App.10-12. And, in their brief in opposition, Respondents emphasized that "[t]his case concerns the application of [the] well-established 'integral and indispensable' standard." BIO at 2. Respondents argued that their complaint satisfied that test because "[p]articipating in an end-of-shift anti-theft search is ... integral to a worker's on-shift duty to refrain from taking Amazon merchandise." *Id.* at 20.

Perhaps understandably, Respondents no longer argue that not stealing is a principal job duty or that security screenings are otherwise integral and

indispensable to any of their principal job activities. Instead, Respondents' lead argument (at 15-33) is that the "integral and indispensable" test is just one way for a pre- or post-shift activity to be deemed compensable. They contend that *any* pre- or post-shift activity that is "required" or "directed" by an employer and performed for the employer's benefit is *per se* compensable, even if the activity is neither integral nor indispensable to the worker's principal activities. That argument is foreclosed by the plain text of the Portal-to-Portal Act and based on an untenable reading of this Court's precedents and DOL's regulations. It would also bring within the FLSA numerous types of activities that Congress plainly intended to exclude when it enacted the Portal-to-Portal Act.

A. Respondents' Proposed Alternative Test Is Inconsistent With the Portal-to-Portal Act and This Court's Precedents.

The first obstacle to Respondents' novel effort to treat pre-shift and post-shift activities that are not "integral and indispensable" to principal activities as nonetheless compensable is the plain text of the Portal-to-Portal Act. The Act broadly provides that time walking and "traveling to and from the actual place of performance of the principal activity or activities" is not compensable absent a custom or practice to the contrary. 29 U.S.C. § 254(a). The Act likewise provides that "activities which are preliminary to or postliminary to said principal activity or activities" are non-compensable. *Id.*

The statutory language necessitates some dividing line between non-compensable preliminary

and postliminary activities and compensable pre- and post-shift activities that are indistinguishable from principal activities. The "integral and indispensable" test marks DOL's and this Court's long-established identification of that dividing line. That test is fully consistent with the statutory text because activities that are integral and indispensable to principal activities are part and parcel of the principal activities and are thus properly classified as compensable principal activities in their own right.

But nothing in the statutory language suggests that there is a class of preliminary or postliminary activity that is nonetheless compensable because it is required by the employer and done for the employer's benefit. Nor do Respondents offer a theory why preliminary and postliminary activities are any less preliminary or postliminary (*i.e.*, that they become principal activities) simply because they are mandatory. Mandatory preliminary and postliminary activities are still preliminary and postliminary activities, and the Portal-to-Portal Act treats preliminary and postliminary activities as non-compensable. Many preliminary and postliminary activities are mandated by the employer. *See* U.S. Br. 22-24. And it seems a safe assumption that most employer-mandates are designed to benefit the employer. Thus, Respondents' novel argument would render a substantial percentage of preliminary and postliminary activities compensable despite the clear language of the Portal-to-Portal Act to the contrary.

Respondents purport to draw support from this Court's precedents, but those cases in fact foreclose the argument. In the very first sentence of *Steiner*,

this Court noted that it was broadly addressing how the FLSA applies to "work performed before or after the direct or productive labor for which the worker is primarily paid." 350 U.S. at 248. As the Court explained, "activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the [FLSA] if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed." *Id.* at 256. *Steiner* thus articulates only a *single* test for determining whether pre- or post-shift activities are compensable—the integral and indispensable standard—and does not in any way suggest that a completely different rule would apply to activities that are "required" or "directed" by the employer.

Respondents' effort to read *Steiner* as merely articulating one, non-exclusive avenue for treating pre- and post-shift time as compensable depends critically on their contention (at 24) that *Steiner*'s holding was limited to "a situation in which an activity (changing clothes) had not been mandated by an employer, but was nonetheless a task-specific practical necessity." But the Court plainly did not cabin its holding in this manner. The activities at issue in *Steiner* included *both* employer-required tasks *and* tasks that were a "practical necessity." Respondents conveniently fail to cite language from *Steiner* emphasizing that "'[i]n the afternoon *the men are required by the company to take a bath* because lead oxide might be absorbed into the blood stream.'" 350 U.S. at 251 (emphasis added). The Court proceeded to apply the integral and indispensable test to post-shift bathing even though this activity was

unquestionably required by the company. *Id.* at 256. Respondents are thus wrong to characterize *Steiner* as being limited to activities that were "not ... mandated by an employer." Resp. Br. 24. And if there really were a separate test for employer-mandated activities, surely *Steiner* would have applied that test to the employer-mandated baths and applied the "integral and indispensable" test only to changing clothes.

Moreover, Respondents largely ignore this Court's decision in *King Packing*, which is also fatal to their legal theory. *King Packing* addressed whether butchers were entitled to compensation for pre-shift knife sharpening, which this Court repeatedly noted was "required" by the employer. The Court emphasized that "*the knifemen are required to sharpen their own knives outside the scheduled shift of eight hours*," and that "[a]t the time a man is hired for, or promoted to, a knife job, it is understood that he will be required to sharpen knives." 350 U.S. at 262 (emphasis added).

If Respondents' view of the law were correct, the Court would have stopped right there and found the knife-sharpening compensable solely because it was "required" by the employer and done for the employer's benefit. But, instead, the Court proceeded to apply the integral and indispensable test to this pre-shift activity, just as it had applied the test to the required post-shift bathing in *Steiner* *Id.* at 263. Respondents' novel theory that all tasks "required" by

an employer are *per se* compensable simply cannot be squared with this Court's precedents.[1]

B. DOL's Regulations Do Not Remotely Suggest That All Activities "Required" by the Employer Are Compensable.

DOL's regulations also make clear beyond cavil that the integral and indispensable test is the sole test used to determine when pre- or post-shift activities are compensable. *See* 29 C.F.R. § 790.8(a) (activity compensable if it is "'indispensable to the performance of productive work'"); *id.* § 790.8(b) (activity compensable if it is "an integral part of a principal activity"). Respondents (at 24-26, 28-33) cite various regulations in support of their legal theory, but—far from establishing a separate rule for employer-required tasks—the cited regulations merely *apply* the longstanding integral and indispensable test to certain types of activities.

1. Respondents (at 24-26, 31) rely heavily on DOL regulations that address situations in which an employee is "engaged to wait." Under those regulations, "[w]here ... an employee is required by his employer to report at a particular hour at his

---

[1] Respondents (at 23 n.15) cite several lower court decisions in support of their theory, but those cases applied the "integral and indispensable" test rather than a separate rule for employer-mandated activities. *See Dunlop v. City Electric*, 527 F.2d 394, 400-01 (5th Cir. 1976) (filling out order forms and fueling, loading, and cleaning trucks integral to electricians' work); *Barrentine v. Arkansas-Best Freight*, 750 F.2d 47, 50-51 (8th Cir. 1984) (vehicle safety inspections integral for truck drivers); *Kellar v. Summit Seating*, 664 F.3d 169, 174 (7th Cir. 2011) (distributing fabric and reviewing work schedules integral for sewing manager).

workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities." 29 C.F.R. § 790.7(h); *see id.* § 790.6(b); *id.* § 553.221. Respondents contend (at 26) that a post-shift security screening is no different from a requirement that workers remain on the premises for another hour after the end of their shifts, which would be compensable under the "engaged to wait" regulation.

That argument is wrong for several reasons. First, the "engaged to wait" regulation simply *applies* the "integral and indispensable" test to certain types of waiting time. It thus provides no support whatsoever for Respondents' argument that all employer-required activities are compensable without regard to the integral and indispensable test.

Second, the same regulations make clear that, while workers must be compensated when they are "engaged to wait," they need not be compensated when they "wait[] to be engaged." 29 C.F.R. § 790.7(h). The difference between the two situations goes to the heart of the difference between principal and preliminary activities. When an employee must be at the workstation at a time certain and then is forced to wait because there is not enough work to do at the beginning of the shift, that waiting time is properly treated as a principal activity. If there had been sufficient work ready to go, the employee would have been engaged at the beginning of the shift (and would likely be docked pay if not there and ready to work).

Time spent going through security is nothing like that. Employees are not waiting to be engaged as soon as a late-breaking order needs fulfillment. Their workday is done. They are free to visit the breakroom or linger in a post-shift conversation. They are simply required to go through security as part of the egress process.[2] The screening process is thus not at all like being "engaged to wait" or any other activity integral and indispensable to a principal activity, but it is exactly like checking out or waiting to do so, which are quintessential non-compensable postliminary activities.

2. Respondents also cite a DOL regulation regarding employees who are required to report early to "distribut[e] clothing or parts of clothing at the work-benches of other employees and get[] machines in readiness for operation by other employees." 29 C.F.R. § 790.8(b). According to Respondents (at 28-29), time in which an employee assists other workers is "not integral and indispensable to his own work" but is "compensable because the employer required the employee to perform the task." In reality, the regulation is doubly unhelpful to Respondents' argument.

First, the regulation hardly supports Respondents' effort to bypass the "integral and

---

[2] Indeed, if employees were entitled to time-and-a-half overtime pay for all time up to and including the exit screening, this would give them a strong incentive to take their time getting through the screening. *Cf. IBP v. Alvarez*, 546 U.S. 21, 35 (2005) (noting the "open-ended and potentially expansive liability that might result from a rule that treated travel before the workday begins as compensable").

indispensable" test, as the regulation itself specifies that this example is an illustration of "what is meant by an integral part of a principal activity." 29 C.F.R. § 790.8(b). Second, passing through security as part of the egress process is nothing like the example discussed in the regulation. For the employee who must report early to distribute clothing and get machines ready for operation, those activities are clearly principal activities that are compensable. Indeed, some employees' principal activities consist entirely of preparatory work for others, as many a junior chef would attest. But no one gets paid simply to go through security or punch a clock. Those are postliminary activities whether or not mandated by the employer.

Respondents' reliance on DOL regulations regarding changing clothes is similarly misplaced. Respondents claim (at 29-30) that "[d]onning and doffing an employer-required uniform on the employer's premises is compensable even if the uniform itself is not indispensable to whatever the employee does while wearing it." That assertion is baffling, as the regulation explicitly applies the integral and indispensable test. The regulation provides that if an employee "cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday *would be an integral part of the employee's principal activity*." 29 C.F.R. § 790.8(c) (emphasis added).

A footnote appended to this sentence in the regulation notes that "[s]uch a situation may exist where the changing of clothes on the employer's

premises is required by law, by rules of the employer, or by the nature of the work." 29 C.F.R. § 790.8(c) n.65. But that footnote simply underscores that there is nothing talismanic about employer mandates. When changing clothes is integral and indispensable to discharging principal activities, it is compensable whether the need to change clothes flows from legal requirements, employer mandates, or practical necessity. And when clothes-changing is not integral or indispensable, it is non-compensable. The presence of legal requirements, employer mandates, or practical necessities may have some probative value in informing whether something is integral and indispensable, but they are no substitute for that test.

3. There is a final, glaring problem with Respondents' effort to draw support for their alternative test from DOL's regulations—namely, DOL's position in this Court as reflected in the *amicus* brief of the United States. In that brief, DOL makes clear that the Ninth Circuit's holding that any activity required by the employer for the employer's benefit satisfied the "integral and indispensable" test was too simplistic, and was inconsistent with the statutory text, judicial precedent, and regulatory gloss. U.S. Br. 19-22 (describing Ninth Circuit's analysis as "unduly spare"). Respondents' related argument that employer-mandated activities that benefit the employer are compensable whether or not "integral and indispensable" is even less compatible with those sources, including DOL's regulations.

The reality is that DOL's contemporaneously-adopted regulations made clear that the process of checking out is a non-compensable postliminary

activity. 29 C.F.R. § 790.7(g). And when DOL first applied those regulations to an employer-mandated security screening, it confirmed that such activity was non-compensable without regard to whether it was part of the ingress or egress process or primarily done to protect employee safety or prevent employee theft. *See* U.S. Br. 28-29 (discussing 1951 Wage & Hour opinion). In short, DOL has made clear that the relevant inquiry is more searching than a simplistic inquiry into whether the activity is employer-mandated and for the employer's benefit. And DOL has made equally clear—both in 1951 and in its brief—that a security screening as part of the egress process is unquestionably a non-compensable postliminary activity.

C. Respondents' Interpretation of the Portal-to-Portal Act Would Dramatically Expand the Scope of Compensable Activities.

Many pre- or post-shift tasks are "required" by employers and done for the employers' benefit but are nonetheless non-compensable preliminary or postliminary activities. Most notably, checking in and out and waiting in line to do so are non-compensable because they are merely part of the ingress and egress process and are neither integral nor indispensable to employees' productive work. 29 C.F.R. § 790.7(g); *see* U.S. Br. 23 (security screenings are "materially analogous to checking out").

Despite the prevalence of the checking out analogy in the briefs of both Integrity and the United States, Respondents have little to say about the non-compensability of the check-out process beyond the

assertion (at 35, 38) that it primarily benefits employees and benefits employers only incidentally. That argument strains credulity, as the check-in/check-out process unquestionably benefits the employer. *See* U.S. Br. 24-25; *Tennessee Coal v. Muscoda*, 321 U.S. 590, 594 (1944) (process "enables the foreman and other officials to tell at a glance those individuals who have reported for work and those production and service crews that are incomplete and in need of substitutes"). It serves important record-keeping and accounting functions, and also prevents cheating, one of the principal functions of the egress security clearance. In a world of perfect honesty, there would be no need for a time clock, a check-out process, or security screenings. In the world we actually live in, all of these are non-compensable postliminary activities.

Respondents' legal theory also would compensate similarly-situated employees differently based on the trivial distinction between activities that are "required" and not just a "practical necessity." If a work area is a five-minute tram ride from the parking lot, it would make little sense to make the compensability of travel time turn on whether the employer requires employees to use the tram for safety reasons or gives employees the option of a longer walk. Similarly, the compensability of time spent in a security screening should not turn on whether the employer formally requires it or designs the workplace to make exiting through a metal detector a practical necessity. It would be nonsensical to adopt a new legal rule that gave dispositive significance to such meaningless distinctions, but that is what Respondents propose.

D. Respondents' Attempts To Disavow the Implications of Their Arguments Are Unavailing.

1. Perhaps recognizing the true breadth of their legal theory, Respondents offer several concessions in an attempt to make their position seem more reasonable. Most notably, Respondents contend (at 14, 48-49) that "[i]n many circumstances, overtime claims related to ordinary security screenings will be precluded by the *de minimis* doctrine." But importing an atextual *de minimis* doctrine to avoid the absurd consequences of a required-by-and-for-the-benefit-of-the-employer test that itself has no grounding in statutory text has little to recommend it. When it comes to statutory construction, two wrongs do not make a right.

Worse still, Respondents' suggested *de minimis* exception repeats an error that Congress has already corrected once. Respondents (at 48-49) cite, apparently without irony, *Mt. Clemens* for the proposition that the "*de minimis* doctrine has for decades been an established part of FLSA jurisprudence." But Congress enacted the Portal-to-Portal Act to abrogate *Mt. Clemens*' core holding *despite* this Court's reassurance that "[w]e do not, of course, preclude the application of a *de minimis* rule where the ... time is such as to be negligible." 328 U.S. at 692. There is no need for a judicially-crafted *de minimis* exception for negligible amounts of time spent in postliminary activities. Congress already made clear that *all* preliminary and postliminary activities, properly defined, are non-compensable.

Moreover, the *de minimis* rule provides cold comfort to employers because it is all but useless at the motion-to-dismiss stage. *See Mt. Clemens*, 328 U.S. at 692 (*de minimis* rule could be applied "only after the trier of facts makes more definite findings as to the amount of walking time in issue"). This is a case in point. The district court dismissed this case despite the fanciful allegation that the screening process took 25 minutes on average. Under the *de minimis* rule, however, Integrity would need to engage in substantial discovery—and withstand the powerful incentives to settle, *see* Retail Litig. Ctr. Br. 16-18—before it could establish the truth about screening times and the existence of a *de minimis* defense.

2. Respondents also seek to downplay the breadth of their arguments by insisting that the FLSA would not apply to security screenings that are "directed at the public as a whole, not at employees." Resp. Br. 49. But, as Integrity explained, *everyone* who enters a secured area in an Amazon.com warehouse is subject to a security screening upon exit, and Respondents do not allege otherwise in their complaint. Pet. Br. 40-42; U.S. Br. 29-30. Thus, in their effort to make their atextual test sound reasonable, Respondents have sacrificed their own complaint.

Moreover, Respondents' purported concession about screenings "directed at the public as a whole" is contrary to their core legal theory that an activity is compensable if it is "expressly ordered by an employer." Resp. Br. 11, 22-33. A security screening required of everyone on the warehouse floor, whether employee or visitor, is just as much required by and

for the benefit of the employer as one that exempts visitors.

Finally, the diverse array of *amici* supporting Integrity undermines Respondents' attempts (at 46-48) to portray this case as a one-off dispute that does not implicate "most typical security practices." Integrity's position is supported by DOL, and groups representing large businesses, small businesses, retailers, manufacturers, human resources professionals, cities, counties, mayors, and municipalities. These groups have diverse and often-conflicting interests, but all agree that interpreting the FLSA to apply to security screenings would be countertextual, tremendously expensive and complicated, and would undermine employers' good-faith efforts to ensure a safe and crime-free workplace.

II. Respondents Badly Misconstrue The Meaning Of "Principal Activities."

Respondents no longer argue that post-shift security screenings actually *satisfy* the integral and indispensable test. Nor can they, as waiting for and walking through a security screening before exiting the building is simply not the kind of task that is integral and indispensable to a warehouse worker's principal job activities. *See infra* Part III; Pet. Br. 24-27; U.S. Br. 18-22. Respondents do, however, take issue with Integrity's application of the integral and indispensable test, and they claim that Integrity's position would allow employers to force employees to perform numerous tasks without pay. Those arguments rest on a fundamentally mistaken conception of an employee's "principal activities" and that concept's role in the statutory scheme.

As Respondents themselves recognize (at 17-18), the Portal-to-Portal Act did not purport to define terms like "work" and "workweek" for FLSA purposes. Rather, the Portal-to-Portal Act sought to address the massive retroactive liability introduced by decisions like *Mt. Clemens* by making clear that time spent traveling to and from the place where workers undertook their "principal activities" was non-compensable, as was time spent on "activities which are preliminary to or postliminary to said principal activit[ies]." 29 U.S.C. § 254(a).

Given the Portal-to-Portal Act's distinction between non-compensable preliminary and postliminary activities and compensable principal activities, it is necessary to have a test to distinguish them. The Portal-to-Portal Act and DOL's regulations use the term "principal activities" for that limited purpose—*i.e.*, for distinguishing between compensable pre-shift and post-shift activities and non-compensable preliminary and postliminary activities. "Principal activities" is not a general-purpose definition of what is compensable, but rather just a way of identifying certain pre-shift and post-shift activities that remain compensable, even though at first blush they might appear to be preliminary or postliminary.[3]

---

[3] The limited office of the "principal activities" concept is underscored by the continuous workday rule, under which an employee is entitled to compensation for the entire "period between the commencement and completion on the same workday of [the] employee's principal activity or activities." 29 C.F.R. § 790.6.

Once it is clear that the concept of "principal activities" is only a means of identifying compensable pre-shift and post-shift activities that might otherwise appear preliminary or postliminary but are in fact "integral and indispensable," all of Respondents' concerns (at 12, 40) about uncompensated lawn mowing and car washing disappear. Those activities are not even arguably preliminary or postliminary and so there is no reason to even ask whether they are principal activities. Security screenings as part of an egress process, by contrast, are obviously postliminary. People are paid to wash cars and cut grass, but no one is paid to go through security all day. That does not mean that every post-shift activity is non-compensable—workers are not paid just to take baths or doff protective gear—but it does explain why activities like lawn mowing need not even be subjected to the integral and indispensable test.[4]

For similar reasons, Respondents are wrong to assert (at 40-41) that Integrity is proposing a test under which courts must determine whether each job activity is "primary" or "secondary," and only count the "primary" ones in determining whether the integral and indispensable test has been satisfied. The "principal activities" standard is not designed to classify workers as being principally engaged in one kind of work or another. It is simply seeking to

---

[4] Respondents' misunderstanding of the role of "principal activities" in the statute is also at the root of their mistaken suggestion (at 22, 32) that everything from blood tests to training sessions would be uncompensated. Those activities are not even arguably preliminary or postliminary, and thus their compensability does not turn on whether they are integral or indispensable to anything else.

identify pre-shift and post-shift activities that are properly treated as compensable, and for those purposes being "integral and indispensable" to any of an employee's principal activities will suffice. DOL's regulations have long recognized that "[t]he use by Congress of the plural form 'activities' in the statute makes it clear that in order for an activity to be a 'principal' activity, *it need not be predominant in some way over all other activities* engaged in by the employee in performing his job." 29 C.F.R. § 790.8(a) (emphasis added).

III. *Amici* Fail To Show That Post-Shift Security Screenings Are Integral And Indispensable To Respondents' Principal Job Duties.

Unlike Respondents, the AFL-CIO argues that post-shift security screenings satisfy the "integral and indispensable" test—albeit just barely. *See* AFL-CIO Br. 7 ("it might have been preferable for [Respondents] to have pleaded more detailed facts about their job responsibilities and the nature of the screenings"); *id.* 8, 25 (Respondents stated a claim under Rule 8 "if just so"). But those arguments are just as flawed as the Ninth Circuit's reasoning in the decision below.

Like the Ninth Circuit, the AFL-CIO addresses the relevant job duties at far too high a level of generality. For example, the AFL-CIO asserts (at 18) that employee theft is a "serious concern" and that the employer has an "efficiency" interest in preventing theft. All of that may well be true, but it does not show that post-shift security screenings are integral and indispensable to Respondents' *principal job activities.* Employers also have an efficiency interest in ensuring that their workers check in and out each day, *see*

Tennessee Coal, 321 U.S. at 594—and an employee's failure to properly check in or out would be a serious concern for the employer—but that does not convert the check-in process into compensable activity.

The AFL-CIO correctly acknowledges that Respondents' job duties involved "'walk[ing] throughout their respective warehouse facilities with collection carts and retriev[ing] products from the shelf and direct[ing] the product to be distributed to Amazon.com customers.'" AFL-CIO Br. 26 (quoting JA20). But the AFL-CIO makes no serious attempt to explain how a post-shift security screening is integral and indispensable to those specific job activities. Respondents can perform every single one of their principal activities in a safe and effective manner regardless of whether they pass through a security screening as part of the egress process after work. Pet. Br. 17; U.S. Br. 21. The screenings simply ensure that employees have not engaged in the *extracurricular* (and illegal) activity of stealing Amazon's merchandise.

The AFL-CIO (at 26) also quotes Respondents' allegation in the complaint that "'it is an essential part of the job of a warehouse worker that they not take items from the warehouse out of the warehouse.'" But the "integral and indispensable" test is not satisfied by merely pleading that a post-shift activity is "essential" (or "indispensable"). Pet. Br. 33-38. And the AFL-CIO does not—and cannot—assert that "not stealing" is one of Respondents' principal job activities for which compensation must be paid. Pet. Br. 40.

IV. Respondents' Policy Arguments Are Unavailing.

Rather than addressing Congress' policy goals in enacting the Portal-to-Portal Act—the statute at issue here—Respondents focus on the general policies underlying the FLSA. But the express purpose of the Portal-to-Portal Act was to *limit* the scope of the FLSA and massive retroactive liability by abrogating this Court's expansive interpretation of the "workweek" in *Mt. Clemens*. *See* Pet. Br. 5-9, 21-24. Congress underscored that the FLSA was never intended to radically reshape customary compensation practices and that mandatory compensation for preliminary and postliminary activities was never intended, even if those tasks—like the ones at issue in *Mt. Clemens*—were performed on the employer's premises and "under the complete control of the employer." *Mt. Clemens*, 328 U.S. at 690-91.

Even the broad goals of the FLSA as originally enacted only underscore why security screenings should not be deemed compensable. For example, Respondents note (at 44-46) that one of the purposes of the FLSA's overtime rules was to "spread employment" by encouraging employers to "hir[e] additional workers rather than burden their existing workforce." But because security screenings are neither productive work in their own right nor integral and indispensable to productive work, it would be nonsensical (and impossible) for an employer to attempt to "spread" this task among more workers. The obvious mismatch between the original goals of the FLSA and the security screenings only underscores why this task is not compensable.

Respondents also claim (at 44, 46) that the time spent in security screenings could be shortened if Integrity "simply hire[d] additional screeners." But a similar argument could be made for nearly any preliminary or postliminary activity. The line to punch the time clock would be shorter if there were more time clocks. The trip between the portal of a mine and the work area would be shorter if the employer installed a faster transport system. And the non-compensable waiting time in *IBP*, 546 U.S. at 40-42, could have been reduced if the employer hired more people to pass out protective clothing.

In sum, the time necessary for most preliminary or postliminary activities could be reduced by greater employer expenditures, and yet Congress expressly made that time non-compensable. Indeed, Congress specifically abrogated the *Mt. Clemens* decision even though the tasks at issue in that case took "2 to 12 minutes daily, if not more." 328 U.S. at 691. Respondents' appeal to arguments that carried the day in *Mt. Clemens* only to be rejected in the Portal-to-Portal Act cannot prevail. *Cf. American Broadcasting Cos. v. Aereo*, 134 S. Ct. 2498 (2014) (declining to embrace arguments that prevailed in an earlier Supreme Court case only to be rejected by Congress in amending the Copyright Act).

Respondents' theory of the FLSA would dramatically expand the types of activities that are subject to the FLSA's mandatory compensation rules, and would fundamentally upset Congress' reasoned policy choice in the Portal-to-Portal Act. If such a sea-change in the law is to be made 65 years after the enactment of the Portal-to-Portal Act, it should be

made by Congress on a prospective basis, not by holding employers retroactively liable for massive money damages for widespread practices that have never before been deemed compensable. *See Christopher v. SmithKline Beecham*, 132 S. Ct. 2156, 2167-68 (2012).

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

NEIL M. ALEXANDER
RICK D. ROSKELLEY
ROGER L. GRANDGENETT II
CORY GLEN WALKER
LITTLER MENDELSON
3960 Howard Hughes
Parkway, Suite 300
Las Vegas, NV 89169
(702) 862-8800

PAUL D. CLEMENT
Counsel of Record
JEFFREY M. HARRIS
BARBARA A. SMITH
BANCROFT PLLC
1919 M Street NW
Suite 470
Washington, DC 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for Petitioner

September 3, 2014

AMICUS CURIAE BRIEF

No. 13-433

In the Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC.,
PETITIONER

v.

JESSE BUSK, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
EDWIN S. KNEEDLER
Deputy Solicitor General
CURTIS E. GANNON
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

M. PATRICIA SMITH
Solicitor of Labor
JENNIFER S. BRAND
Associate Solicitor
PAUL L. FRIEDEN
Counsel for Appellate Litigation
DIANE A. HEIM
Senior Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether time that mail-order-warehouse workers spent undergoing post-shift security screenings to determine whether they had taken merchandise from their workplace was "postliminary" to the principal activities they were employed to perform and was therefore, in the absence of a contrary contract or custom, noncompensable under 29 U.S.C. 254(a)(2).

TABLE OF CONTENTS

Page

Interest of the United States 1
Statutory and regulatory provisions involved 2
Statement 2
Summary of argument 7
Argument 10
Petitioner's post-shift anti-theft screenings were not integral and indispensable to the work performed by its warehouse employees and were therefore noncompensable under 29 U.S.C. 254(a) 10
A. An otherwise "preliminary" or "post-liminary" activity must be closely related to an employee's principal activities to be integral and indispensable to them 11
B. Petitioner's screenings were not integral and indispensable to its workers' principal activities 18
C. Petitioner's screenings cannot be persuasively distinguished from other noncompensable activities 22
1. Petitioner's exit screenings are similar to a requirement that employees check out when departing the premises 23
2. Petitioner's screenings are materially similar to other common kinds of security searches 25
Conclusion 32
Appendix – Statutory and regulatory provisions 1a

TABLE OF AUTHORITIES

Cases:

Aldens, Inc., In re, 51 Lab. Arb. Rep. (BNA) 469 (1968) 26
Alvarez v. *IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), aff'd on other grounds, 546 U.S. 21 (2005) 6

Cases—Continued: Page

Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) 2, 3, 13, 24
Anderson v. *Perdue Farms, Inc.*, 604 F. Supp. 2d (M.D. Ala. 2009) 27
Barnhart v. *Walton*, 535 U.S. 212 (2002) 16
Bonilla v. *Baker Concrete Constr., Inc.*, 487 F.3d 1340 (11th Cir.), cert. denied, 552 U.S. 1077 (2007) 27
Chao v. *Akron Insulation & Supply, Inc.*, 184 Fed. Appx. 508 (6th Cir. 2006) 32
Ciemnoczolowski v. *Q.O. Ordnance Corp.*, 228 F.2d 929 (8th Cir. 1955), opinion adhered to on reh'g, 233 F.2d 902 (8th Cir. 1956), cert. denied, 352 U.S. 927 (1956) 18
Curtis Mathes Mfg. Co., In re, 73 Lab. Arb. Rep. (BNA) 103 (1979) 26
Dunlop v. *City Elec., Inc.*, 527 F.2d 394 (5th Cir. 1976) 32
Gorman v. *Consolidated Edison Corp.*, 488 F.3d 586 (2d Cir. 2007), cert. denied, 553 U.S. 1093 (2008) 28
Herman v. *Rich Kramer Const., Inc.*, 163 F.3d 602 (8th Cir. 1998) (Table) 32
IBP, Inc. v. *Alvarez*, 546 U.S. 21 (2005) ..... *passim*
Lake Park, In re, 83 Lab. Arb. Rep. (BNA) 27 (1984) 26
Lasater v. *Hercules Powder Co.*, 171 F.2d 263 (6th Cir. 1948) 23
Marine Corps Supply Ctr., In re, 65 Lab. Arb. Rep. (BNA) 59 (1975) 27
McGraw-Edison Co., Nat'l Elec. Coil Div., In re, 76 Lab. Arb. Rep. (BNA) 249 (1981) 26
Mitchell v. *King Packing Co.*, 350 U.S. 260 (1956) 8, 17, 20

Cases—Continued: Page

Montgomery Ward & Co., In re, 23 War Lab. Rep. 249 (1945) 26
Rutherford Food Corp. v. *McComb*, 331 U.S. 722 (1947) 19
Safeway Stores, Inc., In re, 84 Lab. Arb. Rep. (BNA) 1193 (1985) 27
Sandifer v. *United States Steel Corp.*, 134 S. Ct. 870 (2014) 11
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 16
Sleiman v. *DHL Express*, No. 09-0414, 2009 WL 1152187 (E.D. Pa. Apr. 27, 2009) 28
Steiner v. *Mitchell*, 350 U.S. 247 (1956) ..... *passim*
United States Dep't of Air Force v. *FLRA*, 952 F.2d 446 (D.C. Cir. 1991) 28
United States Dep't of Justice Fed. Bureau of Prisons Fed. Corr. Inst. Allenwood, Pa. v. *American Fed'n of Gov't Emps. Local 4047*, 65 F.L.R.A. 996 (2011) 27
Whalen v. *United States*, 93 Fed. Cl. 579 (2010) 28

Statutes and regulations:

Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.* 1
29 U.S.C. 203(e)(2)(A) 2
29 U.S.C. 203(*o*) 15
29 U.S.C. 204 1
29 U.S.C. 204(f) 15
29 U.S.C. 206 2
29 U.S.C. 207 2
29 U.S.C. 211 1

Statutes and regulations—Continued: Page

29 U.S.C. 213 2
29 U.S.C. 216(b) 5
29 U.S.C. 216(c) 1
Fair Labor Standards Amendments of 1949, ch. 736, § 16(c), 63 Stat. 920 16
Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq* 1
29 U.S.C. 251(a) 3
29 U.S.C. 252(a) 3
29 U.S.C. 254 (§ 4) 3, 13, 14, 23, 1a
29 U.S.C. 254(a) ..... *passim*
29 U.S.C. 254(a)(1) 12
29 U.S.C. 254(a)(2) 7, 10, 11, 12
29 U.S.C. 259 1
29 U.S.C. 260 5
5 C.F.R. 551.412(b) 15
29 C.F.R.:
Section 785.27 21
Section 785.28 21
Section 785.48(a) 24
Section 790.6 ..... 3a
Section 790.6(b) 11
Section 790.7 ..... 2, 14, 6a
Section 790.7(b) 14
Section 790.7(g) ..... *passim*
Section 790.7(h) 15
Section 790.8 ..... 14, 12a
Section 790.8(a) 21
Section 790.8(b)(1) 20
Section 790.8(b)(1)-(2) 14

Regulations—Continued: Page

Section 790.8(c) ..... *passim*

12 Fed. Reg. 7658-7660 (Nov. 18, 1947) 14

Miscellaneous:

Bureau of Labor Statistics, U.S. Dep't of Labor, *Collective Bargaining Provisions: Discharge, Discipline, and Quits, Bulletin No. 908-5*, H.R. Doc. No. 658, 80th Cong., 2d Sess. (1948) 26

John P. Clark & Richard C. Hollinger, Nat'l Inst. of Justice, U.S. Dep't of Justice, *Theft by Employees in Work Organizations: Executive Summary* (1983) 24, 26, 31

93 Cong. Rec. 2297 (1947) 8, 14, 22

Laurie E. Leader, *Wages and Hours: Law & Practice* (June 2014) 18

Opinion Letter from Wm. R. McComb, Adm'r, Wage and Hour Div., Dep't of Labor, to A.M. Benson, Assistant, Office of the Chief of Ordnance, Dep't of the Army (Apr. 18, 1951) 28, 29

Oxford English Dictionary (1933):

Vol. 5 ..... 19, 20

Vol. 7 13

Vol. 8 12

S. Rep. No. 48, 80th Cong., 1st Sess. (1947) 13, 15, 18, 20, 23

Webster's New International Dictionary of the English Language (2d ed. 1948) 12, 13, 19, 20

In the Supreme Court of the United States

No. 13-433

INTEGRITY STAFFING SOLUTIONS, INC.,
PETITIONER

v.

JESSE BUSK, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The question presented in this case concerns the compensability under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, as amended by the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, of time that warehouse workers must spend undergoing post-shift security screenings to determine whether they have stolen merchandise from their workplace. The Department of Labor's Wage and Hour Division is generally responsible for enforcing the FLSA as amended by the Portal-to-Portal Act. 29 U.S.C. 204, 211, 216(c), 259. Consistent with that responsibility, the Department of Labor has issued interpretive regulations that address what kinds of activities are "preliminary" or "postliminary" and therefore not compensable under those statutes in the absence of contrary

contract or custom. See 29 C.F.R. 790.7. The United States also employs many employees who are covered by the FLSA, 29 U.S.C. 203(e)(2)(A), and requires physical-security checks in many settings. The United States accordingly has a substantial interest in the resolution of the question presented.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-16a.

STATEMENT

1. a. The FLSA generally requires a covered employer to pay a minimum wage for the hours that its non-exempt employees work and to pay overtime compensation when they work more than 40 hours in a workweek. 29 U.S.C. 206, 207, 213. The FLSA, however, does not define the terms "work" or "workweek." This Court concluded, in a series of cases culminating in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), that an employer generally must pay compensation for "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Id.* at 690-691.

In *Anderson*, the Court held that "the time necessarily spent" by employees in walking from timeclocks near the factory entrance gate to their workstations was compensable work time. 328 U.S. at 691-692. It further held that, unless the time involved was so "insubstantial and insignificant" as to be *de minimis*, compensation was required for the time that pottery-plant employees spent "pursu[ing] certain preliminary activities after arriving at their places of work, such as putting on aprons and overalls, removing shirts, taping

or greasing arms, putting on finger cots, preparing the equipment for productive work, turning on switches for lights and machinery, opening windows and assembling and sharpening tools." *Id.* at 692-693.

b. Congress viewed the *Anderson* decision as "creating wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C. 251(a). In the Portal-to-Portal Act, it amended the FLSA, limiting employers' liability for then-existing claims to circumstances in which compensation had been required by contract or custom and practice. 29 U.S.C. 252(a); see *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 26 (2005). With respect to claims accruing on or after the date of its enactment, Section 4 of the Portal-to-Portal Act, 29 U.S.C. 254, provided that, in the absence of a contrary contract or custom, an employer is not required by the FLSA to compensate an employee

> for or on account of any of the following activities * * * —
>
> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. 254(a). Thus, the Portal-to-Portal Act left unchanged the "Court's earlier descriptions of the terms 'work' and 'workweek,'" though it added "express exceptions for travel to and from the location of

the employee's 'principal activity,' and for activities that are preliminary or postliminary to that principal activity." *IBP*, 546 U.S. at 28.

c. In *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), this Court addressed the compensability of the time that employees at a car-battery-manufacturing plant spent changing into and out of work clothes and showering after their shift. *Id.* at 248. The Court held that those activities were not "preliminary" and "postliminary" under the Portal-to-Portal Act, because, in light of the hazardous environment within the plant, they were instead "an integral and indispensable part of the principal activities for which [the] workmen [we]re employed." *Id.* at 256. In 2005, the Court reiterated that the touchstone for determining whether an activity is compensable under Section 254(a) is whether it "is 'integral and indispensable' to a 'principal activity.'" *IBP*, 546 U.S. at 37.

2. Petitioner subcontracts its hourly employees to work in warehouses throughout the United States. Pet. App. 3-4, 20; J.A. 18-19. Respondents were hourly employees of petitioner in two Nevada warehouses, where they filled orders placed by Amazon.com customers by walking throughout the warehouse and retrieving products from the shelves. Pet. App. 3-4; J.A. 17-18, 20. Respondents allege that they "and all other similarly-situated warehouse workers were required to go through a security search before leaving the facilities at the end of the day." J.A. 21. When their shifts ended, they "would walk to the timekeeping system to clock out and were then required to wait in line in order to be searched for possible warehouse items taken without permission and/or other contraband." *Ibid.* The security screenings required them to remove "per-

sonal belongings from their person" and "pass through metal detectors." J.A. 22. Respondents allege that the screening process required them "to wait approximately 25 minutes each day at the end of each shift." J.A. 21. They also allege that the time in question "could have easily been reduced to a de minim[i]s amount by the addition of more security checkers and/or staggering the termination of the shift so people would flow th[r]ough the clearance more quickly." J.A. 27.[1]

As relevant in this Court, respondents claim, in a putative collective action brought on behalf of petitioner's "hourly warehouse employee[s] within the United States," that petitioner violated the FLSA by failing to compensate those employees for the time they routinely spent undergoing and waiting to undergo security screenings as they left the warehouse after their shifts. J.A. 23, 24-28. Respondents seek back pay for that time, and, contending that petitioner's failure to pay was "without substantial justification," they request double damages. J.A. 27; see 29 U.S.C. 216(b), 260. They also request attorney's fees. J.A. 34.

3. The district court granted petitioner's motion to dismiss. Pet. App. 19-35. As relevant here, it held that respondents' allegations did not "demonstrate that the security process is integral and indispensable to their principal activities as warehouse employees fulfilling

---

[1] For purposes of a meal-period claim that is not at issue in this Court, respondents allege that, when the warehouse employees "clocked out" for a meal break during their shift, "it would take approximately five minutes for [the employees] to walk to the facility cafeteria and/or pass through security clearances" and then, after their meal, "approximately five minutes to walk from the cafeteria to the time keeping system to clock back in" without going through the security clearance. J.A. 20.

online purchase orders." *Id.* at 27. Instead, the court explained, "these allegations fall squarely into a non-compensable category of postliminary activities such as checking in and out and waiting in line to do so and 'waiting in line to receive pay checks,' 29 C.F.R. § 790.7(g), because [respondents] could perform their warehouse jobs without such daily security screenings." *Id.* at 27-28. The court found its conclusion supported by other cases "concerning preliminary and postliminary security screenings," which show that even when "the necessity of" security screenings has been "great," courts have found that they were "still not integral and indispensable to the principal activities of employment." *Id.* at 28.

4. The court of appeals reversed in relevant part. Pet. App. 10-13, 17. In determining whether petitioner's screenings were "integral and indispensable" for purposes of Section 254(a), the court applied a two-part test, asking whether they were "(1) 'necessary to the principal work performed' and (2) 'done for the benefit of the employer.'" *Id.* at 10-11 (quoting *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 902-903 (9th Cir. 2003), aff'd on other grounds, 546 U.S. 21 (2005)). It concluded that respondents had "plausibl[y] alleg[ed]" that the screenings at issue "are intended to prevent employee theft." *Id.* at 11. The court observed that petitioner's concern about employee theft "stems from the nature of the employees' work (specifically, their access to merchandise)." *Id.* at 12. It found that "the security clearances are necessary to employees' primary work as warehouse employees" and that they are "done for [petitioner's] benefit." *Id.* at 11-12. As a result, the court held that respondents had stated a plausible claim for relief under the FLSA. *Id.* at 12-13.

The court of appeals addressed cases from other circuits, which had found noncompensable the time that employees spent undergoing security screenings at a nuclear-power plant and at an airport. Pet. App. 12. The court found that those cases were "distinguishable because * * * everyone who entered the workplace had to pass through a security clearance," which indicated that the screenings had not been "put in place because of the nature of the employee's work." *Ibid.* The court further reasoned that the screenings associated with construction workers' access to an airport tarmac "did not benefit" their employer because those screenings were "mandated" by the Federal Aviation Administration. *Ibid.*

SUMMARY OF ARGUMENT

Under the Portal-to-Portal Act, an employer is not required to compensate its employees for time spent in activities that are "preliminary" or "postliminary" to the principal activities they are employed to perform. 29 U.S.C. 254(a)(2). Petitioner's post-shift anti-theft screenings were noncompensable because they were not "integral and indispensable" to the work performed by its warehouse employees. *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 37 (2005).

A. The court of appeals concluded that the purpose of the screenings here, to prevent employee theft, "stems from the nature of the employees' work," which entailed "access to merchandise." Pet. App. 12. But the "integral and indispensable" test requires a closer or more direct relationship between a principal activity and the activity in question before the latter ceases to be "preliminary" or "postliminary" (and therefore noncompensable). The legislative history and the Department of Labor's contemporaneous interpretive regula-

tions reinforce that conclusion by repeatedly referring to such a "close[]" or "direct[]" relationship. See 93 Cong. Rec. 2297 (1947); 29 C.F.R. 790.7(g) n.49, 790.8(c). So do this Court's decisions. See *Steiner* v. *Mitchell*, 350 U.S. 247, 255 (1956).

B. Petitioner's screenings were not integral and indispensable to its warehouse workers' principal activities. There are a few reasonably clear benchmarks established in the legislative history and the regulations, but whether an activity is preliminary or postliminary generally depends on the specific circumstances. The court of appeals applied an unduly spare test when evaluating petitioner's screenings. Those screenings were required by the employer, and undergoing such a screening was thus in one sense "indispensable" to working at the warehouse. But the regulations and this Court's cases require that the activity be "integral and indispensable" to the employee's productive work, and they have not broken that phrase into two wholly separate inquiries. This Court's decisions have found the general test to be satisfied when potentially preliminary or postliminary activities were closely or directly related to the proper performance of the employees' productive work. See *IBP*, 546 U.S. at 40; *Steiner*, 350 U.S. at 248; *Mitchell* v. *King Packing Co.*, 350 U.S. 260, 262 (1956). Here, the anti-theft screenings following the completion of the employees' shifts were not closely intertwined with their principal activity of filling orders in the warehouse, and the court of appeals' focus on whether they were done for the employer's "benefit" (Pet. App. 12) was an insufficient proxy for determining whether they were integral and indispensable to a principal activity.

C. In this case, moreover, the regulations, drawing from the legislative history, do furnish a highly relevant benchmark for deciding the issue. The time at issue here is noncompensable under Section 254(a) because respondents' allegations provide no reason to believe that petitioner's screenings can be persuasively distinguished from other noncompensable activities.

1. Petitioner's exit screenings are similar to a requirement that an employee check out after a shift has ended. The regulations expressly identify "checking in and out and waiting in line to do so" as noncompensable preliminary or postliminary activities "when performed under the conditions normally present." 29 C.F.R. 790.7(g); see also 29 C.F.R. 790.8(c). The physical act of walking through a metal detector is materially analogous to checking out. The extra scrutiny associated with having a guard, as part of the process of the employee's departure from the premises, look into an employee's bag or look at items removed from the employee's pockets does not fundamentally change the nature of the checking-out process, so as to render it integral to the employee's principal activities. And a check-out requirement may share a similar motive with an anti-theft search: seeking to verify that an employee is not receiving pay for inaccurately recorded work time.

2. Petitioner's post-shift screenings are also materially similar to other common kinds of security searches that have generally not been considered to be compensable, regardless of whether they were conducted at entrances or exits. Several lower-court decisions have found general-purpose security searches to be noncompensable. An opinion letter issued by the Department of Labor in 1951 made no distinction between searches conducted for general-security purpos-

es and those conducted at least in part for anti-theft purposes, finding that both were noncompensable under the circumstances. Respondents have sought to distinguish commonplace security screenings on the ground that they are applied to employees and non-employees alike. But that distinction is not ordinarily material to determining whether an activity is integral and indispensable to the employees' work. Nor are the screenings here distinguishable merely because they occur only at the exits. Respondents allege that petitioner was searching for merchandise "and/or other contraband," J.A. 21, which overlaps with the purpose of an entrance search. And an entrance search could prevent damage to the employer's property from acts of vandalism or sabotage, just as an exit search could prevent property loss through asportation.

ARGUMENT

PETITIONER'S POST-SHIFT ANTI-THEFT SCREENINGS WERE NOT INTEGRAL AND INDISPENSABLE TO THE WORK PERFORMED BY ITS WAREHOUSE EMPLOYEES AND WERE THEREFORE NONCOMPENSABLE UNDER 29 U.S.C. 254(a)

The time that petitioner's warehouse employees spent undergoing anti-theft screenings does not need to be compensated under the FLSA in light of the exception that the Portal-to-Portal Act makes for "postliminary" activities. 29 U.S.C. 254(a)(2). The applicability of that exception turns on whether the screenings were "integral and indispensable" to the workers' principal activities. *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 37 (2005).[2] Respondents' allegations do not

---

[2] Under the "continuous workday rule," which was reaffirmed in *IBP*, 546 U.S. at 29, 40, the time that petitioner's employees spent

plausibly establish that the screenings here were integral and indispensable.

A. An Otherwise "Preliminary" Or "Postliminary" Activity Must Be Closely Related To An Employee's Principal Activities To Be Integral And Indispensable To Them

Under the Portal-to-Portal Act's amendment to the FLSA, an activity that is "preliminary" or "postliminary" to an employee's principal activities is noncompensable in the absence of a contrary contract or custom. 29 U.S.C. 254(a)(2). Twice in the last decade, this Court has described the series of events that precipitated the 1947 enactment of the Portal-to-Portal Act. *Sandifer* v. *United States Steel Corp.*, 134 S. Ct. 870, 875 (2014); *IBP*, 546 U.S. at 25-27; see also pp. 2-3, *supra*. In doing so, it has reiterated that an activity becomes compensable under Section 254(a) only when it is "integral and indispensable" to an employee's principal activities. *Sandifer*, 134 S. Ct. at 876 (citation omitted); *IBP*, 546 U.S. at 37.

Here, the court of appeals suggested it was sufficient that the "concern" allegedly underlying petitioner's screenings—preventing employee theft—"stems from the nature of the employees' work." Pet. App. 12. But that is not enough to make an activity compensable. Instead, the statutory text, the legislative history, the 1947 interpretive regulations, and this Court's decisions all demonstrate that the integral-and-indispensable

---

waiting to undergo screening would be compensable if the screening time itself were compensable. As embodied in a regulation that is "consistent with [this Court's] prior decisions interpreting the FLSA," the continuous-workday rule "means that the 'workday' is generally defined as 'the period between the commencement and completion on the same workday of an employee's principal activity or activities.'" *Id.* at 29 (quoting 29 C.F.R. 790.6(b)).

test requires a closer relationship between a principal activity and the activity in question before the latter ceases to be "preliminary" or "postliminary."

1. In the process of excepting certain activities from the scope of the FLSA, the Portal-to-Portal Act specifically identified the time it takes an employee to "travel[] to and from the actual place of performance of the [employee's] principal activity or activities." 29 U.S.C. 254(a)(1). But it also referred, more generically, to the time that employees devote to "activities which are *preliminary* to or *postliminary* to said principal activity or activities." 29 U.S.C. 254(a)(2) (emphases added). Those terms reveal that Congress contemplated that an activity could be related to an employee's principal activities in more than a temporal sense and yet remain noncompensable.

Although the word "preliminary" refers to something that is "previous" or "preceding the main discourse or business," *Webster's New International Dictionary of the English Language* 1950 (2d ed. 1948) (*Webster's Second*), it also carries a further connotation extending beyond that temporal relationship. Something that is preliminary is also "leading to"—or (as the etymology indicates) "at the threshold of"—that which it precedes. *Ibid.* Even though a preliminary activity is separable from the main event, it is by no means unrelated to what follows. Examples in *Webster's Second* include "*preliminary* articles to a treaty" and "*preliminary* measures." *Ibid.* Such preliminaries are related to what follows, in the sense that they lead to it, rather than simply occur earlier in time. In other words, they are "introductory" and "preparatory" to what comes next. 8 *Oxford English Dictionary* 1278 (1933) (*OED*) (defining *preliminary* as "[p]receding

and leading up to the main subject or business; introductory; preparatory"). Thus, nobody expects a preliminary hearing or preliminary injunction to be unrelated to the nature of the underlying lawsuit.

The same is true for "postliminary," which is defined in opposition to "preliminary." *Webster's Second* 1929 ("[d]one or carried on subsequently or as a conclusion; subsequent; — opposed to *preliminary*"); see 7 *OED* 1173 ("opposed to *preliminary*"). That which is "postliminary" is therefore something that follows from and bears some relationship with what went before, not just something that occurs later in time.

2. Both the legislative history and the Department of Labor's contemporaneous interpretive regulations reinforce the conclusion that a compensable activity is one that bears a close or direct relationship to an employee's principal activities.

Section 254 was added to the Portal-to-Portal Act by the Senate Judiciary Committee. See *Steiner* v. *Mitchell*, 350 U.S. 247, 254 (1956). The non-exhaustive list of examples that the Committee's report gave of activities that would *not* be compensable included the time employees spent walking or traveling to the actual place of performance of their principal activities as well as the time spent "[c]hecking in or out and waiting in line to do so, changing clothes, washing up or showering, waiting in line to receive pay checks, and the performance of other activities occurring prior and subsequent to the workday, such as the preliminary activities which were involved in [*Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)]." S. Rep. No. 48, 80th Cong., 1st Sess. 47 (1947) (*Senate Report*). Senator John Sherman Cooper—"a sponsor of the bill and a member of the three-man subcommittee that held

hearings for the Committee," *Steiner*, 350 U.S. at 254 —explained that compensation would, however, continue to be required for "those activities which are *so closely related* and are an *integral* part of the [employee's] principal activity, *indispensable* to its performance, [that they] must be included in the concept of principal activity." 93 Cong. Rec. 2297 (1947) (emphases added).

Six months after enactment of the Portal-to-Portal Act, the Department of Labor issued interpretive regulations addressing, *inter alia*, Section 254's references to compensable "principal activities" and noncompensable "preliminary" and "postliminary" activities. See 12 Fed. Reg. 7658-7660 (Nov. 18, 1947). The regulations—which are still in effect today, see 29 C.F.R. 790.7, 790.8—stated that principal activities include those that are "an integral part of a principal activity," providing illustrations tied to preparing machines or items for work (such as by oiling, greasing, or cleaning a machine, or installing a new cutting tool in it; or being required to report before other employees to distribute items to work benches and "get[] machines in readiness for operation"). 29 C.F.R. 790.8(b)(1)-(2). The regulations also stated that "[a]mong the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance." 29 C.F.R. 790.8(c).

The regulations explained that "[n]o categorical list of 'preliminary' and 'postliminary' activities except those named in the Act can be made," because the same activities may be preliminary or postliminary "under one set of circumstances" but principal activities "under other conditions." 29 C.F.R. 790.7(b). Drawing upon the legislative history, however, the regulations

identified some activities (in addition to walking and traveling) that "would be considered 'preliminary' or 'postliminary'" "when performed under the conditions normally present," including "checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks." 29 C.F.R. 790.7(g) & n.49 (citing *Senate Report* 47). The regulations noted that "[w]ashing up after work, like the changing of clothes, may in certain situations be *so directly related* to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's 'principal activity'." 29 C.F.R. 790.7(g) n.49 (emphasis added); see also 29 C.F.R. 790.8(c).[3] They also recognized that if an employee is required to report at a particular hour at the place where he performs his principal activity, but no work is yet available for him to do, then he has been "engaged [by the employer] to wait," and such "waiting for work would be an integral part of the employee's principal activities." 29 C.F.R. 790.7(h).

In 1949, when Congress added another provision to the FLSA dealing with washing and clothes-changing (see 29 U.S.C. 203(*o*)), it effectively ratified the 1947 interpretive regulations, stating that "[a]ny * * * interpretation of the Administrator of the Wage and Hour Division" then in effect "shall remain in effect * * * except to the extent that [it] may be inconsistent with [the 1949 amendments], or may from time

---

[3] Similarly, the Office of Personnel Management—which administers the FLSA's application to most employees of the United States, 29 U.S.C. 204(f)—has promulgated a regulation stating that "[a] preparatory or concluding activity that is not closely related to the performance of the principal activities is considered a preliminary or postliminary activity." 5 C.F.R. 551.412(b).

to time be amended, modified, or rescinded by the Administrator." Fair Labor Standards Amendments of 1949, ch. 736, § 16(c), 63 Stat. 920.[4]

3. In 1956, this Court decided two cases concerning the scope of Section 254(a). In *Steiner*, *supra*, it held that "activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions * * * if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section [254](a)(1)." 350 U.S. at 256. *Steiner* relied on the portions of legislative history quoted above, including the statement of Senator Cooper (which it reprinted in an appendix to the opinion, *id.* at 256-257). The Court also noted that the 1949 Congress had been made aware of the Wage and Hour Administrator's interpretation of the statute as providing for compensation of "certain preparatory activities closely related to the principal activity and indispensable to its performance." *Id.* at 255. *Steiner* involved employees in a car-battery-manufacturing plant who were regularly exposed to chemicals, including lead dust and sulphuric acid, that could be hazardous to their health and even that of their families if "brought home in the

---

[4] Even without that unusual statutory ratification, the Department's longstanding interpretive regulations would be entitled to deference because they reflect the considered views of the agency charged with enforcing the FLSA, and they have been left undisturbed by Congress in its many intervening reexaminations of the FLSA. See *Barnhart* v. *Walton*, 535 U.S. 212, 221-222 (2002); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) (noting that the Wage and Hour Administrator's interpretations of the FLSA "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

workers' clothing or shoes." *Id.* at 249-250, 255. The Court concluded that "it would be difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of the principal activity of the employment." *Id.* at 256.

In *Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956), which was decided on the same day as *Steiner*, the Court held that the time that employees at a meat-packing plant spent sharpening their knives, before their shifts began, was "an integral part of and indispensable to the various butchering activities for which [the workers] were principally employed." *Id.* at 263.

In 2005, the Court reaffirmed that "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity.'" *IBP*, 546 U.S. at 37. At the same time, it acknowledged that something may "comfortably qualify as a 'preliminary' activity" and not be "integral and indispensable." *Id.* at 40. That is how the Court described time that employees in a poultry-processing plant spent waiting to put on "integral and indispensable gear." *Ibid.* The time it took to don the gear was compensable. *Ibid.* Although the antecedent time waiting to don the gear at the beginning of the workday was "necessary for employees to engage in their principal activities," *ibid.*, the Court nevertheless held that that time was noncompensable. *Id.* at 40-42. The Court found such time analogous to "the time that employees must spend waiting to check in or waiting to receive their paychecks," which is noncompensable under the Department of Labor's regulations. *Id.* at 41 (citing 29 C.F.R. 790.7(g)). And the Court said it could identify "no limiting principle" that would distinguish the waiting time from the time necessary to "walk[] from a timeclock near the factory gate to a work-

station"—time that Congress plainly intended the Portal-to-Portal Act to render noncompensable. *Ibid.*

B. Petitioner's Screenings Were Not Integral And Indispensable To Its Workers' Principal Activities

Both the Senate Judiciary Committee's report on the Portal-to-Portal Act and the Department of Labor's regulations recognized the impossibility of compiling a comprehensive or categorical list of activities that would be noncompensable in light of Section 254(a). See *Senate Report* 48-49; 29 C.F.R. 790.7(b). There are a few longstanding and reasonably clear benchmarks, including one of particular relevance to this case: that the time spent checking in and out and waiting in line to do so is noncompensable under normal conditions. 29 C.F.R. 790.7(g), 790.8(c); see pp. 15, 17, *supra*. As a general matter, however, "[w]hether an activity is characterized as * * * 'an integral and indispensable part' of the employee's principal activities (as distinguished from preliminary or postliminary to those activities), is a question of fact to be determined from all of the circumstances." Laurie E. Leader, *Wages and Hours: Law & Practice* § 6.03[7], at 6-28 (June 2014); see *Ciemnoczolowski* v. *Q.O. Ordnance Corp.*, 228 F.2d 929, 934 (8th Cir. 1955) ("Whether a preliminary or postliminary activity, necessary to the performance of the 'principal activity', is an integral part of the principal activity is a question of fact to be determined from all the relevant evidence."), opinion adhered to on reh'g, 233 F.2d 902 (8th Cir. 1956), cert. denied, 352 U.S. 927 (1956); 29 C.F.R. 790.7(h) ("[A]n activity which is a 'preliminary' or 'postliminary' activi-

ty under one set of circumstances may be a principal activity under other conditions.").[5]

1. In this case, the court of appeals inquired only whether the screening activities were (1) "necessary to employees' primary work as warehouse employees" and (2) "done for [the employer's] benefit." Pet. App. 11-12. That is an unduly spare test for determining whether petitioner's screenings were integral and indispensable to the employees' productive work.

To the extent that the security screenings were required by petitioner, they were "indispensable" in the sense that they were "[n]ot capable of being dispensed with, set aside, neglected, or pronounced nonobligatory." *Webster's Second* 1267; see 5 *OED* 219 (defining "indispensable," when used to describe a "duty," as referring to one "[t]hat cannot be dispensed with, remitted, set aside, disregarded, or neglected"); see also 29 C.F.R. 790.8(c) & n.65 (noting that it may be that an employee "cannot perform his principal activities without putting on certain clothes," when "the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work"). But the phrase "integral and indispensable"—which has not been broken into two separate inquiries by this Court or the regulations—requires more than is encompassed in the court of appeals' analysis. It requires a close or direct relationship to the actual performance of the employee's productive work.

---

[5] Such circumstance-specific analysis is consistent with that required in other FLSA contexts, such as determining whether an individual is an employee or individual contractor. See *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 730 (1947) ("[T]he determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity.").

Something is "integral" when it is "[e]ssential to completeness." *Webster's Second* 1290; see 5 *OED* 366 (defining an "integral" part as one that is "[b]elonging to or making up an integral whole; constituent, component; *spec*[*ifically*] necessary to the completeness or integrity of the whole; forming an intrinsic portion or element, as distinguished from an adjunct or appendage"). The legislative history and the regulations give the example of oiling, greasing, or cleaning a lathe, or installing a new cutting tool, as "an integral part of the principal activity" of operating the lathe. *Senate Report* 48; 29 C.F.R. 790.8(b)(1). That example is akin to the knife-sharpening in *King Packing*, which was a constituent part of effective butchering. 350 U.S. at 262. As the Court explained, the knife-sharpening activities were integral and indispensable to "various butchering operations" in a meat-packing plant, because "[a]ll of the knives * * * *must* be 'razor sharp' for the proper performance of the work," as "a dull knife would slow down production * * *, affect the appearance of the meat as well as the quality of the hides, cause waste[,] and make for accidents." *Ibid.* (emphasis added).

Similarly, in *Steiner*, the Court explained that the principal activities of the employees in a car-battery-manufacturing plant involved "extensive use of dangerously caustic and toxic materials," and the employees were "*compelled by circumstances*, including vital considerations of health and hygiene, to change clothes and to shower." 350 U.S. at 248 (emphasis added). The clothes-changing and showering activities were accordingly integral and indispensable to safely manufacturing car batteries. And, in *IBP*, the Court found that "the donning of certain types of protective gear" was

"*always* essential if the [poultry-processing-plant] worker [were] to do his job." 546 U.S. at 40. Thus, in all of those cases, the activities found compensable were closely or directly related to the actual performance of the employees' productive work.

Here, by contrast, petitioner's screenings may or may not be a reasonable response to a concern about employee theft. But those screenings do not have a similarly close connection to the performance of the employees' productive work in the warehouse. As the regulations indicate, "Congress intended the words 'principal activities' to be construed liberally * * * to include any work of consequence performed for an employer, no matter when the work is performed." 29 C.F.R. 790.8(a). Moreover, its use of "the plural form 'activities' in the statute makes it clear that in order for an activity to be a 'principal' activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job." *Ibid.*[6] But the anti-theft screenings following the completion of the employees' shifts were not closely intertwined with their principal activity (*i.e.*, retrieving merchandise from the warehouse shelves to fill customers' orders). Instead, as discussed below, the screenings were essentially a form of (or closely akin to) the ordinary process of checking out while leaving the premises after the employees' principal activities had ended. Accordingly, the court of appeals' focus on whether the

---

[6] Thus, for instance, an employer's requirement that employees undergo certain mandatory training would be a compensable principal activity even if the training did not relate directly to the employees' ability to perform the physical tasks that were more obviously part of their work of consequence for the employer. See 29 C.F.R. 785.27, 785.28.

screenings were "done for [the employer's] benefit" (Pet. App. 12) was an insufficient proxy for determining whether they were integral and indispensable to the employees' principal activities.

2. The court of appeals also described petitioner's "concern" about employee theft as something that "stems from the nature of the employees' work (specifically, their access to merchandise)." Pet. App. 12. But that, too, was insufficient to demonstrate that the screenings were integral and indispensable to the work. As described above (see pp. 13-16, *supra*), the legislative history and regulations from which the Court derived the integral-and-indispensable test require the act in question to be "closely related" to the employees' principal activities—not just somehow originating from them. See *Steiner*, 350 U.S. at 255; 93 Cong. Rec. at 2297; 29 C.F.R. 790.8(c).

C. Petitioner's Screenings Cannot Be Persuasively Distinguished From Other Noncompensable Activities

As discussed above, petitioner's post-shift screenings are not comparable to the activities that this Court determined to be integral and indispensable in *Steiner*, *King Packing*, and *IBP*. But the conclusion that the time spent undergoing those screenings is noncompensable under Section 254(a) perhaps follows even more strongly from another consideration—that respondents' allegations provide no reason to believe that petitioner's screenings can be persuasively distinguished from other noncompensable activities, like a requirement that employees check out when they leave the employer's premises or that they undergo other common kinds of security searches. Cf. *IBP*, 546 U.S. at 41 (finding pre-donning waiting time noncompensable because "no limiting principle" could distinguish it from

the inarguably noncompensable time spent "walking from a timeclock near the factory gate to a workstation").

1. Petitioner's exit screenings are similar to a requirement that employees check out when departing the premises

a. There is no dispute that, barring unusual circumstances, a required checking out after a shift has ended is noncompensable. The regulations expressly identify "checking in and out and waiting in line to do so" as noncompensable preliminary or postliminary activities "when performed under the conditions normally present." 29 C.F.R. 790.7(g); see also 29 C.F.R. 790.8(c) ("activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities"). In that regard, they directly track the Senate Judiciary Committee's discussion of Section 254. See *Senate Report* 47.

b. The physical act of walking through a metal detector while exiting a facility is materially analogous to checking out—whether the latter is done by filing past a guard who checks an employee's identity and notes that the employee is leaving; or by signing a serial attendance log; or by swiping an electronic badge past a sensor and proceeding through a turnstile; or by punching a timeclock.[7] The act itself may take only a

---

[7] An employer may require employees to punch a timeclock without then using the corresponding times for computing their actual hours of work. Such practices were not uncommon when the Portal-to-Portal Act was enacted. See *Lasater* v. *Hercules Powder Co.*, 171 F.2d 263, 264 (6th Cir. 1948) ("The records made by the time clocks were not used to calculate the hours worked but to check the presence of employees."). Indeed, the paradigmatic activity made

few seconds for each employee, but the process of lining up will generally take longer. Cf. *Anderson*, 328 U.S. at 683 (explaining that "an average of 25 employees can punch the clock per minute" but it takes "a minimum of 8 minutes" for all the employees in a shift "to get by the time clock[s]"). The same guard who checks an employee's identity may, as part of the same process, also look into the employee's purse, briefcase, or bags, or glance at items removed from the employee's pockets. That extra scrutiny, ancillary to departing the premises, does not fundamentally change the nature of the checking-out process so as to render it integral to the employee's principal activities.

c. In addition, the motivation for a requirement that employees check in and out will often be similar, at least in part, to the motivation for anti-theft screenings. To the extent that requirements to check in and out are driven by a need to confirm whether an employee is present for his shift, they are rooted in a recognition of the value of applying verification procedures to all employees to ensure that an employee does not receive pay for hours that he did not work—whether because he missed a shift, he took an overlong lunch, or his supervisor inaccurately recorded his hours. Because checking in and out before and after shifts and meal breaks would make inaccurate reporting of hours less likely, the requirement to do so could be characterized as an "anti-theft" measure.[8]

---

noncompensable by the statute is "walking from a timeclock near the factory gate to a workstation." *IBP*, 546 U.S. at 41; cf. 29 C.F.R. 785.48(a) (noting that "[m]inor differences between the clock records and actual hours worked cannot ordinarily be avoided").

[8] See John P. Clark & Richard C. Hollinger, Nat'l Inst. of Justice, U.S. Dep't of Justice, *Theft by Employees in Work Organizations:*

d. A requirement to check in and out may also be driven by the employer's reasonable desire to have a record, for various purposes, of who is on the premises at any given time. For that reason, the requirement may be enforced at the doors to the building, or at a gate in a surrounding fence, or at the vehicular entrance and exit to the employee parking lot. And an employee could be required to undergo the process of badging in and out even when he is not reporting for work and is on the premises only to pick up a pay check or do some other non-work act.

There is no evident reason why the noncompensability of "checking in and out and waiting in line to do so" (29 C.F.R. 790.7(g)) should depend on whether those acts occur closer to or farther from the places where the employees actually perform their principal activities. Nor should it depend on whether the employer is seeking to confirm that employees are present to work, or simply to confirm that they are present, or both. Similarly, there is no reason why the noncompensability of screenings that are in essence checking out, or are part of the process of departing the premises (and thus closely analogous to checking out), should turn on the location or precise reason for the screening.

2. *Petitioner's screenings are materially similar to other common kinds of security searches*

The post-shift screenings at issue here are also materially similar to other common kinds of security searches that have generally not been considered to be compensable.

Executive Summary 6 (1983) (*Clark & Hollinger*) (noting that employee theft may involve time as well as property).

a. Theft, or pilferage, by employees has long been considered a serious problem.[9] And there is at least anecdotal evidence dating back decades that some employers have required employees to show packages for inspection as they leave work (and are off the clock).[10]

---

[9] See, *e.g.*, *Clark & Hollinger* i, 2 (noting mid-1970s estimate that employee pilferage accounted for annual losses in the United States of $5 to $10 billion); *In re Montgomery Ward & Co.*, 23 War Lab. Rep. 249, 258 (1945) (noting that 500 to 600 employees of mail-order company's Chicago warehouse were apprehended annually for theft of merchandise); Bureau of Labor Statistics, U.S. Dep't of Labor, *Collective Bargaining Provisions: Discharge, Discipline, and Quits; Dismissal Pay Provisions, Bulletin No. 908-5*, H.R. Doc. No. 658, 80th Cong., 2d Sess. 4 (1948) (listing "pilferage" as reason for just-cause discharge in collective-bargaining agreements).

[10] See *In re Lake Park*, 83 Lab. Arb. Rep. (BNA) 27, 31 (1984) (upholding employee's discharge for refusing to submit to inspection of purse; noting that "the common sense of the situation" permits searches "as employees depart the work place" and that "[t]he time clock here (as I think is customary) is located inboard of the exi[t] and security station," making it reasonable for search to be conducted "near where employees leave the work place and *after* they have clocked out"); *In re McGraw-Edison Co., Nat'l Elec. Coil Div.*, 76 Lab. Arb. Rep. (BNA) 249, 250, 253 (1981) (upholding manufacturing company's policy of searching all lunch boxes and packages as employees exited through gate in chain-link fence between plant and parking lot); *In re Aldens, Inc.*, 51 Lab. Arb. Rep. (BNA) 469, 470-471 (1968) (upholding discharges of employees who refused to comply with orders that their purses be searched after they had clocked out, pursuant to mail-order company's policy responding to its "serious problem" with merchandise theft); see also *In re Curtis Mathes Mfg. Co.*, 73 Lab. Arb. Rep. (BNA) 103, 105, 107 (1979) (finding that one-time post-shift visual search of employees' handbags was *de minimis* and noncompensable, but noting that, despite the employer's Portal-to-Portal Act arguments, the result would "likely" have been different if such searches were routine; further noting evidence that employer had previously conducted searches, sometimes on a daily basis); p. 29, *infra* (describing entry and exit

Such searches are similar to other common security searches, performed at the entrances and exits to employers' premises, which have not been found to be compensable under the FLSA and the Portal-to-Portal Act. Although there are not many cases addressing security searches, previous judicial and administrative decisions have considered various permutations. Some involved searches that were conducted only at entrances, such as when construction workers gained access to a civilian airport tarmac,[11] when correctional officers reported for duty at a federal prison,[12] or when employees entered a gate outside a chicken-processing-plant.[13] Others also involved exit searches, such as

---

searches conducted at ordnance plant operated by federal contractor in 1951). Two arbitrators applying a circumstance-specific analysis found that one-time post-shift searches of all employees' vehicles for missing property were compensable under the relevant contracts. See *In re Safeway Stores, Inc.*, 84 Lab. Arb. Rep. (BNA) 1193, 1194-1195 (1985) (finding employer's failure to compensate for 30-minute delay was an "unreasonable" invocation of its right to inspect vehicles on its property; ordering each employee to be paid for six minutes at their overtime rates); *In re Marine Corps Supply Ctr.*, 65 Lab. Arb. Rep. (BNA) 59, 60, 62-63 (1975) (requiring compensation in light of FLSA principles, without mentioning Portal-to-Portal Act's exception for postliminary activities).

[11] *Bonilla* v. *Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1340-1341, 1344 (11th Cir. 2007) (holding noncompensable the time construction workers spent "pass[ing] through a single security checkpoint" before reaching tarmac), cert. denied, 552 U.S. 1077 (2007).

[12] *United States Dep't of Justice Fed. Bureau of Prisons Fed. Corr. Inst. Allenwood, Pa.* v. *American Fed'n of Gov't Emps. Local 4047*, 65 F.L.R.A. 996, 1000 (2011) (finding that "passing through the security screening is not compensable as a principal activity" for correctional officers at a federal prison).

[13] *Anderson* v. *Perdue Farms, Inc.*, 604 F. Supp. 2d 1339, 1359 (M.D. Ala. 2009) (holding noncompensable the time spent walking

when workers (and visitors) exited a nuclear power plant,[14] an Air Force base,[15] or a mail-sorting facility.[16]

The Department of Labor has identified only one opinion letter of its Wage and Hour Division addressing security or anti-theft searches. Significantly, that opinion letter did not distinguish between those two purposes and concluded that employees did not need to be compensated for the time they spent complying with a regime comprising both kinds of searches. See Opinion Letter from Wm. R. McComb, Adm'r, Wage & Hour Div., Dep't of Labor, to A.M. Benson, Assistant, Office of the Chief of Ordnance, Dep't of the Army

---

through gate in chain-link fence, displaying company identification cards to guard—who could, but normally did not, search belongings—and then walking from security area to timeclock).

[14] *Gorman* v. *Consolidated Edison Corp.*, 488 F.3d 586, 592-593 & n.2 (2d Cir. 2007) (screening upon entry to nuclear-power plant involved radiation detector, x-ray machine, and explosive metal detector; screening upon exit involved "many of these things," including radiation test; holding that those processes were "required and serve[d] essential purposes of security" but were "not integral to principal work activities" of plant employees), cert. denied, 553 U.S. 1093 (2008).

[15] *Whalen* v. *United States*, 93 Fed. Cl. 579, 601 (2010) ("The security inspections plaintiffs must undergo to enter and leave Edwards [Air Force Base] are not integral to their principal activities as air traffic controllers."); cf. *United States Dep't of Air Force* v. *FLRA*, 952 F.2d 446, 452-453 (D.C. Cir. 1991) (treating time that employees at Robins Air Force Base spent waiting to exit through gates in security fence as postliminary and "not closely related to principal work activities").

[16] *Sleiman* v. *DHL Express*, No. 09-0414, 2009 WL 1152187, at *4 (E.D. Pa. Apr. 27, 2009) (holding that time mail workers spent waiting for and going through security after being randomly selected for the process upon entry or egress is noncompensable in part because there is "no clear link between Class Members' principal activities and their procession through security").

(Apr. 18, 1951). The letter, which dates from only four years after the Portal-to-Portal Act, recounted the requester's description of the procedures to be followed by employees of a federal contractor at a facility that produced explosive powder for the Army. *Id.* at 1-2. Workers were required to "go through a 'badge alley'" to obtain their badge and time card, then walk 150 to 300 feet to a fence where they were searched for spark-producing devices and "other items which have a direct bearing on the safety of the employees and the Ordnance Works," and then walk to a bus that would carry them ¾ to 1½ miles to their work sites. *Id.* at 1. The badge alley was described as "essentially a security matter" because it kept "the record of hours worked," and the "match inspection" was described as "essentially for safety reasons." *Id.* at 2. The post-shift procedure for leaving was "basically the same," except that the "outgoing inspection" at the fence was "also made for the purpose of preventing theft." *Ibid.* After recounting that description, the Administrator concluded, without analysis, that "under the circumstances described the time spent in the badge alley and security checks, and the travel to and from work places in this situation need not be counted" as compensable "in the absence of a written or nonwritten contract or of a custom or practice." *Ibid.*

b. Respondents themselves have not contended that all security screenings are compensable. To the contrary, they have sought—at considerable length (Br. in Opp. 6-18)—to distinguish the anti-theft screenings here from other security-related searches, contending in particular (*id.* at 24) that "the commonplace searches at the entrances of government buildings would not be compensable activity under the standard in any cir-

cuit." Like the decision below (Pet. App. 12), they rely on the fact that most searches in high-security environments apply to "everyone entering an office or plant," without regard to whether they are employees. Br. in Opp. 23-24. But respondents' complaint does not even allege that petitioner's screening requirement applies only to its hourly warehouse employees. See Pet. Br. 41; J.A. 21 (alleging that "[p]laintiffs and all other similarly-situated warehouse workers were required to go through a security search before leaving the facilities at the end of the day").

In any event, that purported distinction does not withstand scrutiny. An activity can be integrally related to an employee's principal activities even if others must also engage in it. Otherwise, an employer could evade its FLSA obligations by allowing an occasional visitor on the premises, subject to a requirement that almost always applies only to employees. Conversely, an act—such as checking in or out, or walking to the place of principal work activities—is noncompensable if it is not integral and indispensable to the employees' principal activities, whether or not anyone else is required (or has occasion) to engage in that act.

c. Nor does the location of petitioner's screenings (at the exit but not at the entrance), or one of their alleged purposes (anti-theft), distinguish them for present purposes from other common security searches. An exit search is not necessarily confined to anti-theft purposes. It may serve instead as a double-check for items, like contraband or weapons, that may be the subject of an entrance search. It may also help confirm that forbidden items are not somehow finding their way to employees after they enter the facility. Indeed, respondents' own allegations indicate that petitioner's

screenings had, at least in part, such a purpose. They allege that petitioner was "search[ing] for possible warehouse items taken without permission *and/or other contraband.*" J.A. 21 (emphasis added); see also *ibid.* (describing petitioner's "search for possible contraband or pilferage of inventory"); J.A. 35 (letter from respondents' counsel providing notice, for state-law purposes, of demand that petitioner pay for the time warehouse employees "spent waiting for and undergoing security checks and searches for theft or contraband").

By the same token, an entrance search may, like an exit search, be intended to prevent loss of the employer's property by intercepting items that could be used to damage the premises or inventory through acts of vandalism or sabotage rather than asportation.[17] There is accordingly no clear-cut distinction—either in terms of purpose or effect—between petitioner's screenings and those that are routine at countless government and private-sector buildings.

* * * * *

As in *IBP*, the absence of a "limiting principle" (546 U.S. at 41) that distinguishes between petitioner's screenings and other typically noncompensable activities—checking out and undergoing common security searches—strongly supports the conclusion that the time spent undergoing those screenings (and waiting to undergo them) is noncompensable in the absence of a contract or custom providing otherwise.[18]

---

[17] See *Clark & Hollinger* 5 ("Not all worker behavior directed against the property of the organization must involve its physical removal from the premises.").

[18] This is not to say that all other end-of-shift requirements, or even searches, would be treated the same. For instance, if employees were required to complete paperwork about what they had

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
CURTIS E. GANNON
Assistant to the Solicitor General

M. PATRICIA SMITH
Solicitor of Labor
JENNIFER S. BRAND
Associate Solicitor
PAUL L. FRIEDEN
Counsel for Appellate Litigation
DIANE A. HEIM
Senior Attorney
Department of Labor

JUNE 2014

---

done during their shift, transport equipment to a central location, or obtain assignments for their next shift, such activities would generally be compensable. Cf. *Chao* v. *Akron Insulation & Supply, Inc.*, 184 Fed. Appx. 508, 511 (6th Cir. 2006) (holding compensable the "shop time" of employees engaged in off-site installation, who were required to report "well before the 'official' start time of 7:30 a.m." to "receive[] assignments, assemble[] work crews, and load[] trucks with material and equipment"; at the end of the day, they "would return to the shop to return equipment and report to [the company president] about the job and receive arrival times for the following day"); *Herman* v. *Rich Kramer Const., Inc.*, 163 F.3d 602 (8th Cir. 1998) (Table), 1998 WL 664622, at *1, *2 (holding compensable the "shop time" of construction foremen who "loaded trucks, received crew assignments, and studied blueprints" before driving to job site and, at the end of the day, "filled out time-sheets, unloaded and locked the trucks, and secured equipment"); *Dunlop* v. *City Elec., Inc.*, 527 F.2d 394, 397, 400-401 (5th Cir. 1976) (holding compensable various pre-shift activities of electricians, including "filling out of time sheets, material sheets, and supply and cash requisition sheets," as well as "fueling, loading, and cleaning out" trucks used to travel from shop to "various jobsites").

APPENDIX

1. 29 U.S.C. 254 provides:

Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation

(a) Activities not compensable

Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 201 et seq.], the Walsh-Healey Act, or the Bacon-Davis Act[1], on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an

---

[1] See References in Text note below.

employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

(b) Compensability by contract or custom

Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to any activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) Restriction on activities compensable under contract or custom

For the purposes of subsection (b) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) Determination of time employed with respect to activities

In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. § 201 et seq.], of the Walsh-Healey Act, or of the Bacon-Davis Act[1], in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

2. 29 C.F.R. 790.6 provides:

Periods within the "workday" unaffected.

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the "workday" proper, roughly described as the period "from whistle to whistle," and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period.[34] Under the provisions of section 4, one of the conditions that must be present before "preliminary" or "postliminary" activities are excluded from hours worked is that

---

[1] See References in Text note below.

[34] The report of the Senate Judiciary Committee states (p. 47), "Activities of an employee which take place during the workday are * * * not affected by this section (section 4 of the Portal-to-Portal Act, as finally enacted) and such activities will continue to be compensable or not without regard to the provisions of this section."

they 'occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted.[35] The principles for determining hours worked within the "workday" proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act,[36] which is concerned with this question only as it relates to time spent outside the "workday" in activities of the kind described in section 4.[37]

---

[35] See Senate Report, pp. 47, 48; Conference Report, p. 12; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 (also 2084, 2085); statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388; statements of Senator Cooper, 93 Cong. Rec. 2293-2294, 2296-2300; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362.

[36] The determinations of hours worked under the Fair Labor Standards Act, as amended is discussed in part 785 of this chapter.

[37] See statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 3269. See also the discussion in §§ 790.7 and 790.8.

(b) "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the "workday", and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.[38] If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his "workday" commences at the time he reports there for work in accordance with the employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would be part of the workday,[39] and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

---

[38] Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Senator Donnell, 93 Cong. Rec. 2362; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298.

[39] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297, 2298.

3. 29 C.F.R. 790.7 provides:

"Preliminary" and "postliminary" activities.

(a) Since section 4 of the Portal Act applies only to situations where employees engage in "preliminary" or "postliminary" activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked. If such time would otherwise be counted as time worked under the Fair Labor Standards Act, section 4 may not change the situation. Whether such time must be counted or may be disregarded, and whether the relief from liability or punishment afforded by section 4 of the Portal Act is available to the employer in such a situation will depend on the compensability of the activity under contract, custom, or practice within the meaning of that section.[40] On the other hand, the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not "preliminary" or "postliminary" activities outside the workday.[41] And even where there is a contract, custom, or practice to pay for time spent in such a "preliminary" or "postliminary" activity, section 4(d) of

---

[40] See Conference Report. pp. 10, 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2178-2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298. See also §§ 790.4 and 790.5.

[41] See Conference Report, p. 12; Senate Report, pp. 47, 48; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388. See also § 790.6.

the Portal Act does not make such time hours worked under the Fair Labor Standards Act, if it would not be so counted under the latter Act alone.[42]

(b) The words "preliminary activity" mean an activity engaged in by an employee before the commencement of his "principal" activity or activities, and the words "postliminary activity" means an activity engaged in by an employee after the completion of his "principal" activity or activities. No categorical list of "preliminary" and "postliminary" activities except those named in the Act can be made, since activities which under one set of circumstances may be "preliminary" or "postliminary" activities, may under other conditions be "principal" activities. The following "preliminary" or "postliminary" activities are expressly mentioned in the Act: "Walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which (the) employee is employed to perform."[43]

(c) The statutory language and the legislative history indicate that the "walking, riding or traveling" to which section 4(a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor does it include travel during the employee's regular working hours.[44] For example, trav-

---

[42] See § 790.5(a).

[43] Portal Act, subsections 4(a), 4(d). See also Conference Report, p. 13; statement of Senator Donnell, 93 Cong. Rec. 2181, 2362.

[44] These conclusions are supported by the limitation, "to and from the actual place of performance of the principal activity or activities

el by a repairman from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of "walking, riding or traveling" described in section 4(a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel would not ordinarily be "walking, riding, or traveling" of the type referred to in section 4(a). One example would be a traveling employee whose duties require him to travel from town to town outside his regular working hours; another would be an employee who has gone home after completing his day's work but is subsequently called out at night to travel a substantial distance and perform an emergency job for one of his employer's customers.[45] In situations such as these, where an employee's travel is not of the kind to which section 4(a) of the Portal Act refers, the question whether the travel time is to be counted as worktime under the Fair Labor Standards Act will continue to be determined by principles established under this Act, without reference to the Portal Act.[46]

---

which (the) employee is employed to perform," which follows the term "walking, riding or traveling" in section 4(a), and by the additional limitation applicable to all "preliminary" and "postliminary" activities to the effect that the Act may affect them only if they occur "prior to" or "subsequent to" the workday. See, in this connection the statements of Senator Donnell, 93 Conf. Rec. 2121, 2181, 2182, 2363; statement of Senator Cooper, 93 Cong. Rec. 2297. See also Senate Report, pp. 47, 48.

[45] The report of the Senate Judiciary Committee (p. 48) emphasized that this section of the Act "does not attempt to cover by specific language that many thousands of situations that do not readily fall within the pattern of the ordinary workday."

[46] These principles are discussed in part 785 of this chapter.

(d) An employee who walks, rides or otherwide travels while performing active duties is not engaged in the activities described in section 4(a). An illustration of such travel would be the carrying by a logger of a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to the cutting area. In such a situation, the walking, riding, or traveling is not segreable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) and it does not constitute travel "to and from the actual place of performance" of the principal activities he is employed to perform.[47]

(e) The report of the Senate Committee on the Judiciary (p. 47) describes the travel affected by the statute as "Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out." The phrase, actual place of performance," as used in section 4(a), thus emphasizes that the ordinary travel at the beginning and end of the workday to which this section relates includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the per-

---

[47] Senator Cooper, after explaining that the "principal" activities referred to include activities which are an integral part of a "principal" activity (Senate Report, pp. 47, 48), that is, those which "are indispensable to the performance of the productive work," summarized this provision as it appeared in the Senate Bill by stating: "We have clearly eliminated from compensation walking, traveling, riding, and other activities which are not an integral part of the employment for which the worker is employer." 93 Cong. Rec. 2299.

formance of the principal activity or activities, and the return travel from that place at the end of the workday. However where an employee performs his principal activity at various places (common examples would be a telephone lineman, a "trouble-shooter" in a manufacturing plant, a meter reader, or an exterminator) the travel between those places is not travel of the nature described in this section, and the Portal Act has not significance in determining whether the travel time should be counted as time worked.

(f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.[48]

(g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.[49]

---

[48] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2121, 2182, 3263.

[49] See Senate Report p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related

(h) As indicated above, an activity which is a "preliminary" or "postliminary" activity under one set of circumstances may be a principal activity under other conditions.[50] This may be illustrated by the following example: Waiting before the time established for the commencement of work would be regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities.[51] The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged.[52]

---

to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity". See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298. See also paragraph (h) of this section and § 790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

[50] See paragraph (b) of this section. See also footnote 49.

[51] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2298.

[52] See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 7 WHR 1165.

4. 29 C.F.R. 790.8 provides:

"Principal" activities.

(a) An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the "principal" activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted.[53] But before it can be determined whether an activity is "preliminary or postliminary to (the) principal activity or activities" which the employee is employed to perform, it is generally necessary to determine what are such "principal" activities.[54]

The use by Congress of the plural form "activities" in the statute makes it clear that in order for an activity to be a "principal" activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job;[55] rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several "principal" activities during the workday. The "principal" activities referred to in the statute are activi-

---

[53] See §§ 790.4 through 790.6 of this bulletin and part 785 of this chapter, which discusses the principles for determining hours worked under the Fair Labor Standards Act, as amended.

[54] Although certain "preliminary" and "postliminary" activities are expressly mentioned in the statute (see § 790.7(b)), they are described with reference to the place where principal activities are performed. Even as to these activities, therefore, identification of certain other activities as "principal" activities is necessary.

[55] Cf. *Edward F. Allison Co., Inc.* v. *Commissioner of Internal Revenue*, 63 F. 2d 553 (C.C.A. 8, 1933).

ties which the employee is "employed to perform";[56] they do not include noncompensable "walking, riding, or traveling" of the type referred to in section 4 of the Act.[57] Several guides to determine what constitute "principal activities" was suggested in the legislative debates. One of the members of the conference committee stated to the House of Representatives that "the realities of industrial life," rather than arbitrary standards, "are intended to be applied in defining the term 'principal activity or activities'," and that these words should "be interpreted with due regard to generally established compensation practices in the particular industry and trade."[58] The legislative history further indicates that Congress intended the words "principal activities" to be construed liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed.[59] A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered "sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work."[60]

---

[56] Cf. *Armour & Co.* v. *Wantock*, 323 U.S. 126, 132-134; *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 136-137.

[57] See statement of Senator Cooper, 93 Cong. Rec. 2297.

[58] Remarks of Representative Walter, 93 Cong. Rec. 4389. See also statements of Senator Cooper, 93 Cong. Rec. 2297, 2299.

[59] See statements of Senator Cooper, 93 Cong. Rec. 2296-2300. See also Senate Report, p. 48, and the President's message to Congress on approval of the Portal Act, May 14, 1947 (93 Cong. Rec. 5281).

[60] See statement of Senator Cooper, 93 Cong. Rec. 2299.

(b) The term "principal activities" includes all activities which are an integral part of a principal activity.[61] Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal Bill.[62] They are the following:

(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the work-benches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.[63]

---

[61] Senate Report, p. 48; statements of Senator Cooper, 93 Cong. Rec. 2297-2299.

[62] As stated in the Conference Report (p. 12), by Representative Gwynne in the House of Representatives (93 Cong. Rec. 4388) and by Senator Wiley in the Senate (93 Cong. Rec. 4371), the language of the provision here involved follows that of the Senate bill.

[63] Statement of Senator Cooper, 93 Cong. Rec. 2297; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350. The fact that a period of 30 minutes was mentioned in the second example

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance.[64] If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes,[65] changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity.[66] On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity.[67] However, activities such as checking in and out and waiting in line to do so would not ordinarily be

---

given by the committee does not mean that a different rule would apply where such preparatory activities take less time to perform. In a colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2298, Senator Cooper stated that "There was no definite purpose in using the words '30 minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes." In reply to questions, he indicated that any amount of time spent in preparatory activities of the types referred to in the examples would be regarded as a part of the employee's principal activity and within the compensable workday. Cf. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 693.

[64] See statements of Senator Cooper, 93 Cong. Rec. 2297-2299, 2377; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350.

[65] Such a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work. See footnote 49.

[66] See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298.

regarded as integral parts of the principal activity or activities.[67]

---

[67] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2305-2306, 2362; statements of Senator Cooper, 93 Cong. Rec. 2296-2297, 2298.

AMICUS CURIAE BRIEF

No. 13-433

IN THE

Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC.,
Petitioner,

v.

JESSE BUSK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Lynn K. Rhinehart
Harold C. Becker
James B. Coppess
Matthew J. Ginsburg
(Counsel of Record)
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5397

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
STATEMENT	2
SUMMARY OF ARGUMENT	4
ARGUMENT	7
CONCLUSION	27

TABLE OF AUTHORITIES

CASES: Page

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946) 20, 21

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 25

Bonilla v. Baker Concrete Constr., Inc., 487 F.3d 1340 (11th Cir. 2007) 14, 15, 16

Busk v. Integrity Staffing Solutions, Inc., No. 2:10-cv-01854-RLH-RJJ, 2011 U.S. Dist. LEXIS 79773 (D. Nev., July 19, 2011) 3

Busk v. Integrity Staffing Solutions, Inc., 713 F.3d 525 (9th Cir. 2013) ..... *passim*

Dunlop v. City Elec., Inc., 527 F.2d 394 (5th Cir. 1976) 22

Genesis Healthcare Corp. v. Symczyk, 33 S. Ct. 1523 (2013) 1, 2

Gorman v. Consolidated Edison Corp., 488 F.3d 586 (2d Cir. 2007) 13, 15

Herman v. Rich Kramer Constr., Inc., No. 97-4308WMS, 1998 U.S. App. LEXIS 23329 (8th Cir., Sept. 21, 1998) 22

IBP, Inc. v. Alvarez, 546 U.S. 21 (2005) ..... *passim*

Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, 325 U.S. 161 (1945) 21

Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011) 2

TABLE OF AUTHORITIES—Continued

	Page
Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158 (2007)	2
Mitchell v. King Packing Co., 350 U.S. 260 (1956)	9, 10
Sandifer v. U.S. Steel Corp., 134 S. Ct. 870 (2014)	1
Steiner v. Mitchell, 350 U.S. 247 (1956)	*passim*
Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944)	20, 21, 24
Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 135 F.2d 320 (5th Cir. 1943)	21
STATUTES, REGULATIONS AND RULES:	
Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*	
29 U.S.C. § 206(a)	8
29 U.S.C. § 207(a)(1)	8
Portal-to-Portal Act of 1947, 29 U.S.C. § 251 *et seq.*	
29 U.S.C. § 254(a)	1, 8, 9
10 C.F.R. § 20.1502	13
29 C.F.R. § 785.43	14
29 C.F.R. § 790.7	*passim*
Fed. R. Civ. P. 8(a)(2)	25

TABLE OF AUTHORITIES—Continued

Page

MISCELLANEOUS:

Brief for United States as *Amicus Curiae* Supporting Petitioners, *Tum v. Barber Foods, Inc.*, No. 04-66 ..... 19, 20

Centers for Disease Control and Prevention, Updated U.S. Public Health Service guidelines for the management of occupational exposures to HIV and recommendations for Postexposure Prophylaxis, MMWR 2005:54 (No. RR-9) .. 14

Nuclear Regulatory Commission, Administrative Practices in Radiation Surveys and Monitoring, Regulatory Guide 8.2 (Rev. 1, May 2011) 13

Nuclear Regulatory Commission, Information Relevant to Ensuring That Occupational Radiation Exposures at Nuclear Power Stations Will Be As Low As Is Reasonably Achievable, Regulatory Guide 8.8 (Rev. 3, June 1978) 13

Opinion Letter from Wm. R. McComb, Adm'r, Wage & Hour Div., Dep't. of Labor, to A.M. Benson, Assistant, Office of the Chief of Ordnance, Dep't of the Army (April 18, 1951) 23, 24

S. Rep. No. 48, 80th Cong., 1st Session (Mar. 10, 1947) 21

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a total membership of approximately 12.5 million working men and women.[1]

This case concerns the proper interpretation of Section 4(a)(2) of the Portal-to-Portal Act, 29 U.S.C. § 254(a)(2), which makes "activities which are preliminary to or postliminary to [an employee's] principal activity or activities" noncompensable under the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA). As a federation of labor organizations whose members are, by and large, covered by the FLSA's minimum wage and overtime requirements, the AFL-CIO has a strong interest in the proper interpretation of the FLSA as amended by the Portal-to-Portal Act. For that reason, the AFL-CIO has frequently filed *amicus* briefs in this Court in cases concerning the FLSA and the Portal-to-Portal Act. *See, e.g.*, *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870 (2014); *Genesis Healthcare Corp. v. Symczyk*, 133 S.

---

[1] Counsel for the petitioner and counsel for the respondents have each filed letters with the Court consenting to the filing of *amicus* briefs on either side. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

Ct. 1523 (2013); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007); *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005).

STATEMENT

Plaintiffs Jesse Busk and Laurie Castro are former employees of Integrity Staffing Solutions, Inc. who worked at warehouses operated by internet retailer Amazon.com in Las Vegas and Fernley, Nevada. JA 17-18, 20. Integrity Staffing is in the business of leasing hourly employees like Busk and Castro to work at warehouses owned by Amazon.com and other companies throughout the United States. JA 17. At the Nevada warehouses where they worked, Busk and Castro's primary job responsibilities involved retrieving products from warehouse shelves and directing those products to be distributed to Amazon.com customers. JA 20.

Busk and Castro brought suit against Integrity Staffing under the Fair Labor Standards Act (FLSA) for unpaid minimum wages and overtime based in part on Integrity Staffing's failure to pay them for time spent "to go through a security search before leaving the facilities at the end of the day" as required by Integrity Staffing's policy. JA 19 & 21. According to their Complaint, "[a]t the end of their respective shifts, hundreds of warehouse employees would walk to the timekeeping system to clock out and were then required to wait in line in order to be searched for possible warehouse items taken without permission and/or other contraband." *Ibid.* Busk and Castro described this screening as "a post 9/11 type of airport security clearance – i.e., warehouse employees were

required to remove all personal belongings from their person such as wallets, keys, and belts, and pass through metal detectors before being released from work and allowed to leave the facility." *Id.* at 21-22. They alleged that they "were required to wait approximately 25 minutes each day at the end of each shift . in order to undergo [this] search[.]" *Id.* at 21.

Integrity Staffing moved to dismiss the claim for unpaid wages for the time spent in security screenings on the basis that "[a]s a matter of law, the time Plaintiffs allege they spent going through security checks is not compensable pursuant to federal law." Def. Mot. to Dismiss Amended Complaint 7 (Dkt. Entry #16, Jan. 18, 2011). The district court agreed, holding that security screenings "fall squarely into a non-compensable category of postliminary activities such as checking in and out and waiting in line to do so and 'waiting in line to receive pay checks,' 29 C.F.R. § 790.7(g)." *Busk v. Integrity Staffing Solutions, Inc.*, No. 2:10-cv-01854-RLH-RJJ, 2011 U.S. Dist. LEXIS 79773, at *12 (D. Nev., July 19, 2011). Busk and Castro appealed, and the court of appeals reversed.

The court of appeals observed that Busk and Castro "allege[d] that the screenings are intended to prevent employee theft" and that this was "a plausible allegation since the employees apparently pass through the clearances only on their way out of work, not when they enter." *Busk v. Integrity Staffing Solutions, Inc.*, 713 F.3d 525, 530-31 (9th Cir. 2013). The court of appeals noted that Busk and Castro were employed to handle merchandise and that Integrity Staffing had conducted the screening to prevent employee theft, a concern that "stems from the nature of the employees' work (specifically, their access to merchandise)." *Id.*

at 531. The court of appeals concluded that the district court had erred in applying "a blanket rule that security clearances are noncompensable instead of assessing the plaintiffs' claims under the 'integral and indispensable' test." *Ibid.*

Integrity Staffing filed a petition for a writ of certiorari on the question "whether time spent in security screenings is compensable under the FLSA, as amended by the Portal-to-Portal Act," Cert. Pet. i., which this Court granted.

SUMMARY OF ARGUMENT

The court of appeals correctly rejected the district court's conclusion that there is a "blanket rule" under the FLSA to the effect that all security screenings are noncompensable. Rather, whether time spent in a security screening is compensable turns on whether the purpose of the screening is closely related to employees' primary job duties.

Section 4(a)(2) of the Portal-to-Portal Act makes "activities which are preliminary to or postliminary to [an employee's] principal activity or activities" noncompensable under the FLSA's minimum wage and overtime requirements. 29 U.S.C. § 254(a)(2). However, just because an activity takes place before or after employees undertake their primary job duties does not necessarily render that activity noncompensable. Under *Steiner v. Mitchell*, 350 U.S. 247 (1956), a pre-shift or post-shift activity which is "integral and indispensable" to employees' primary job duties is treated as a compensable principal activity in its own right. Such an activity is integral and indispensable to employees' primary job duties if it is closely related to the specific work the employee is employed to perform.

Generally, whether a particular pre-shift or post-shift activity is a compensable principal activity or a noncompensable preliminary or postliminary activity can only be determined by reference to the nature of employees' primary job duties. Compensable pre-shift and post-shift activities include those that are functionally necessary for employees to undertake their primary job duties, such as pre-shift knife sharpening required for butchers to do their work. However, as *Steiner* illustrates, a pre-shift or post-shift activity that is not functionally related to job performance can still be compensable if it is vital to the efficiency of the employer's production process and closely related to employees' primary job duties. For example, *Steiner* held that where employees must shower and change clothes on the employer's property as a result of their exposure to toxic chemicals in the workplace, these activities are compensable, even though they do not assist employees in carrying out their job duties.

When this analysis is applied to pre-shift and post-shift screenings, it is clear that there is no "blanket rule" regarding whether screenings are compensable. Rather, whether any particular screening is compensable depends on how closely related it is to employees' primary job duties. For example, screening employees who undertake certain high-risk jobs within a nuclear power station for radiation exposure would constitute a compensable principal activity. The same is true where a healthcare provider must be screened for exposure to an infectious disease as a result of his or her primary job duties caring for patients who are infected with the disease.

In contrast, generalized screenings of anyone who enters a job site or a facility where the job site is lo-

cated are typically not so closely related to employees' specific primary job duties as to be compensable. For example, where construction workers who are engaged in building an airport terminal must pass through a security screening to reach their job site, the screening is not compensable because it is not closely related to the work the construction workers are engaged to do but rather to the airport's own security requirements. This example illustrates two significant indicia of whether a particular screening is closely related to employees' primary job duties: whether the screening applies generally or just to a particular group of employees, and how proximate the screening location is to the location where employees undertake their primary job duties.

The fact that the screening in this case is intended to prevent an unlawful act, employee theft, does not change the analysis. Integrity Staffing – whose employees are engaged in handling valuable merchandise for Integrity Staffing's client – has a very strong efficiency-based interest in safeguarding the merchandise its employees handle. Because of the close relationship between Integrity Staffing's interest in deterring theft and employees' primary job duties handling merchandise, the anti-theft screenings constitute a compensable principal activity.

Finally, the fact that these screenings are relatively brief is not relevant to whether the screenings are compensable. This Court made clear in *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005) – where it held that the few moments it took for employees to toss protective gear into laundry and trash bins after their shifts was a compensable activity that ended the work day – that whether a pre-shift or post-shift activity is compensa-

ble turns on how closely related it is to employees' primary job duties, not how long the activity takes to complete. Likewise, Integrity Staffing's contention that screenings are merely part of "checking out," which Department of Labor regulations generally treat as a noncompensable postliminary activity, is unavailing. The checking in and out referenced in the regulations is noncompensable because it serves the limited functions of registering an employee's presence at the beginning of the work day and recording the employee's departure at day's end. When additional activities are added to that process – such as an anti-theft security screening – the compensability of each additional activity must be evaluated on its own terms.

The court of appeals was therefore correct to reverse the district court's decision holding that screenings are *per se* noncompensable preliminary and postliminary activities. Although it might have been preferable for Busk and Castro to have pleaded more detailed facts about their job responsibilities and the nature of the screenings in order to support an inference that the screenings were closely related to their primary job duties, the court of appeals' decision that their pleadings were sufficient to survive a motion to dismiss was correct.

ARGUMENT

The court of appeals correctly held that the district court erred by dismissing Busk and Castro's claim that they were entitled to compensation for time spent in security screenings on the basis of "a blanket rule that security clearances are noncompensable." *Busk v. Integrity Staffing Solutions, Inc.*, 713 F.3d 525, 531 (9th

Cir. 2013). While screenings that bear no close relation to employees' primary job duties constitute non-compensable preliminary or postliminary activities, screenings that are "closely intertwined with [employees'] principal activity," Gov. Br. 21, constitute compensable principal activities in their own right. In this case, Busk and Castro sufficiently alleged – if just so – that the anti-theft screenings of warehouse workers were closely enough related to their primary job duties to survive a motion to dismiss.[2]

A. The FLSA requires the payment of a statutorily-defined minimum wage for all hours worked, 29 U.S.C. § 206(a), and pay at "a rate not less than one and one-half times the regular rate" "for a workweek longer than forty hours," 29 U.S.C. § 207(a)(1). "Neither 'work' nor 'workweek' is defined in the statute." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 25 (2005). However, in 1947, Congress enacted the Portal-to-Portal Act, which specifically exempted from minimum wage and overtime requirements time spent on the following activities:

> "(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

---

[2] As the government correctly explains, "[u]nder the 'continuous workday rule,' which was reaffirmed in *IBP*[, *Inc. v. Alvarez*], 546 U.S. [21,] 29, 40 [2005], the time that petitioner's employees spent waiting to undergo screening would be compensable if the screening time itself were compensable." Gov. Br. 10-11 n.2. Therefore, the only question in this case is whether the screening is compensable.

> (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities[.]" Portal-to-Portal Act § 4(a); 29 U.S.C. § 254(a).

Despite the statute's references to "preliminary" and "postliminary" activities, this Court's decisions interpreting the Portal-to-Portal Act make clear that "work performed before or after the direct or productive labor for which the worker is primarily paid" can nevertheless be compensable, *Mitchell v. King Packing Co.*, 350 U.S. 260, 260 (1956):

> "[A]ctivities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an *integral and indispensable* part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1)." *Steiner v. Mitchell*, 350 U.S. 247, 253 (1956) (emphasis added). *See also King Packing*, 350 U.S. at 261 (holding same).

That is, "§ 4 of the Portal-to-Portal Act does not remove activities which are 'integral and indispensable' to 'principal activities' from FLSA coverage precisely because such activities are themselves 'principal activities.'" *IBP*, 546 U.S. at 33 (quoting *Steiner*, 350 U.S. at 253)).

Whether an activity performed before or after the regular work shift is "integral and indispensable" to

the principal activities for which workers are primarily employed is a question that can only be answered by reference to the nature of employees' primary job duties. If the pre-shift or post-shift activity is "so closely related to other duties performed by employees as to be an integral part thereof," *Steiner*, 350 U.S. at 252 (quotation marks omitted) – or, in the Department of Labor's words, is "so directly related to the specific work the employee is employed to perform," 29 C.F.R. § 790.7(g) n.49 – it is compensable. For this reason, "[n]o categorical list of 'preliminary' and 'postliminary' activities except those named in the Act can be made, since activities which under one set of circumstances may be 'preliminary' or 'postliminary' activities, may under other conditions be 'principal' activities." 29 C.F.R. § 790.7(b).

Integrity Staffing contends that the "integral and indispensable" test limits compensable activities to only those pre-shift and post-shift activities required for an employee to "discharge all of their principal job functions," *i.e.*, "[b]utchers cannot cut meat properly without first sharpening their knives." Pet. Br. 17 (citing *King Packing*, 350 U.S. at 262-63). This Court has never interpreted its "integral and indispensable" test so narrowly.

The integral and indispensable standard clearly encompasses more than preparatory activities that are functionally related to "the direct or productive labor for which the worker is primarily paid," *King Packing*, 350 U.S. at 260, such as pre-shift knife sharpening by butchers. In *Steiner*, this Court made abundantly clear that pre-shift and post-shift activities are also compensable if they are closely related to employees' primary job duties in the sense that they support the employer's

managerial interest in "increas[ing] the efficiency of its operation." 350 U.S. at 248, 250-51. Thus, in *Steiner*, which involved the production of automobile batteries, a process that involved "extensive use of dangerously caustic and toxic materials," this Court held that time spent on "the removal of clothing and showering at the end of the work period" was compensable, *id.* at 248 & 250, even though such washing and clothes-changing would ordinarily be considered preliminary or postliminary activities, *see* 29 C.F.R. § 790.7(g). Obviously, changing clothes and showering on the employer's premises was not *functionally* necessary for the production of car batteries; the employer in *Steiner* could have suggested to employees that they wash up and change clothes at home without any negative effect on the production process. But this Court concluded that because post-shift clothes-changing and washing on the employer's premises was necessary "to make the[] plant as safe a place as is possible under the circumstances and thereby increase the efficiency of its operation," "it would be difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of the principal activity of the employment than in the case of these employees." *Id.* at 251 & 256.

B. When the *Steiner* analysis is applied to screenings that take place at the beginning or end of the work day, it is clear that those screenings that closely relate to employees' primary job duties are compensable, while screenings unrelated or not closely related to such duties are not. Integrity Staffing's several arguments to the contrary all conflict with this Court's well-established understanding of the "integral and indispensable" test set forth in *Steiner*.

1. As an initial matter, contrary to Integrity Staffing's argument, there is no *per se* rule regarding whether pre-shift and post-shift searches are compensable. Rather, whether a particular search "is characterized as 'an integral and indispensable part' of the employee's principal activities (as distinguished from preliminary or postliminary to those activities), is a question of fact to be determined from all of the circumstances." Gov. Br. at 18 (brackets, quotation marks, and citation omitted). That is because "activities which under one set of circumstances may be 'preliminary' or 'postliminary' activities, may under other conditions be 'principal' activities." 29 C.F.R. § 790.7(b). For example, "changing clothes" and "washing up or showering" "when performed under the conditions normally present, would be considered 'preliminary' or 'postliminary' activities." 29 C.F.R. § 790.7(g). But, as *Steiner* illustrates, such activities are compensable "where changing clothes and showering are clearly an integral and indispensable part of the principal activity" for which employees are employed. 350 U.S. at 256.

The same is true regarding screening. We know from *Steiner* that where a pre-shift or post-shift activity is "compelled by circumstances, including vital considerations of health and hygiene" because employees' work involves "dangerously toxic materials," it is "so closely related to other duties performed by employees as to be an integral part thereof[.]" 350 U.S. at 248, 252. It stands to reason, then, that screening required to determine whether cleaning of the body is needed as a result of exposure to dangerous materials at the workplace is also closely related to employees' primary job duties.

For example, where employees' primary productive duties may involve exposure to radioactive materials – such as for those engaged in certain tasks within a nuclear power station[3] – they must be screened for exposure levels in order to determine whether they need to be decontaminated before leaving the facility. *See* 10 C.F.R. § 20.1502 (nuclear power station operators "shall monitor exposures to radiation and radioactive material at levels sufficient to demonstrate compliance with the occupational dose limits" set by the NRC). *See also* NRC, Administrative Practices in Radiation Surveys and Monitoring, Regulatory Guide 8.2, at 2 (Rev. 1, May 2011) (setting forth recommended elements of "an effective radiation survey and monitoring program"). There is no question that, under *Steiner*, such a decontamination procedure would be "so closely related to [the primary productive] duties performed by employees as to be an integral part thereof[.]" 350 U.S. at 252. *A fortiori*, screening such employees for radiation exposure levels to determine whether decontamination is necessary is compensable because, like the decontamination process itself, the screening is "closely related to" employees' job duties. *Cf. Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 593 n.4 (2d Cir. 2007) ("In the nuclear con-

---

[3] The Nuclear Regulatory Commission (NRC) explains that the employees who are at greatest risk of exposure include those "performing services such as maintenance, refueling, and inspection in high radiation areas," as well as those undertaking "rad-waste handling" and involved in the "decommissioning process." NRC, Information Relevant to Ensuring That Occupational Radiation Exposures at Nuclear Power Stations Will Be As Low As Is Reasonably Achievable, Regulatory Guide 8.8-2, 8.8-12 (Rev. 3, June 1978).

tainment area [of the Indian Point II nuclear power plant] – which more closely resembles the battery plant [in *Steiner*] – employees wore specialized gear and dosimeters, and were compensated for donning and doffing.").

A similar analysis applies where a registered nurse or other health care provider must be screened for exposure to an infectious disease. *See, e.g.*, Centers for Disease Control and Prevention, Updated U.S. Public Health Service guidelines for the management of occupational exposures to HIV and recommendations for Postexposure Prophylaxis, MMWR 2005:54 (No. RR-9), available at http://www.cdc.gov/niosh/topics/bbp/emergnedl.html (last checked Aug. 5, 2014). "Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked," 29 C.F.R. § 785.43, including when such medical attention is required because of occupational exposure to an infectious disease. *A fortiori*, screening to determine whether such medical attention is necessary is "so closely related" to the employee's primary job duties as to constitute a compensable principal activity as well.

In contrast, *generalized* screenings of everyone who enters the job site or the facility where the job site is located are typically *not* so closely related to any particular group of employees' specific job duties as to be compensable. The archetypal case is *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340 (11th Cir. 2007), which involved construction workers engaged to build an airport terminal who were required

to pass through a security screening in order to gain access to the tarmac where they boarded buses to travel to the job site. Tellingly, the security screening did not just apply to the construction workers but to anyone who sought to access to the tarmac. The court of appeals correctly held that this screening was not compensable because it was not closely related to employees' construction of the airport terminal, nor was it related in any way to the employer's managerial interest in the efficiency of production. *See id.* at 1344 (noting that the employer "did not primarily – or even particularly – benefit from the security regime," presumably because the security screening constituted a time-consuming annoyance from the construction company's point of view).

Bonilla thus aptly illustrates two significant indicia of whether a particular screening is closely related to employees' primary productive activities: (1) whether the screening applies generally or just to employees or a particular group of employees; and (2) how proximate the screening is to the location where employees undertake their primary job duties.

The fact that an employer requires all employees to be screened – or, in the case of *Bonilla*, that the airport requires anyone wanting to access the tarmac to be screened – is a strong indication that the screening is not closely related to any particular group of employees' specific productive activities. *Cf. Gorman*, 488 F.3d at 594 (noting the fact that "the security measures at entry are required . . for everyone entering the plant – regardless of what an employee does (servicing fuel rods or making canteen sandwiches) – and including visitors" was evidence security screen-

ings did not constitute "principal activities of employment").[4] The identity of who is screened lends insight into the purpose of the screening; common sense dictates that an employer ordinarily will not seek to screen individuals for whom the particular screening is not relevant, given the expense to the employer of screening as well as the likely annoyance to employees and guests if they are routinely screened unnecessarily.

Likewise, if screening occurs at a location distant from where employees conduct their primary productive activities, that fact tends to indicate that the screening is of a general, rather than a job-related, nature. For example, if employees are required to pass through a metal detector when they first enter onto the employer's property, such as is "routine at countless government and private-sector buildings," Gov. Br. 31, or must pass through a security screening before entering an airport tarmac to board buses to take them to their job site, *Bonilla*, 487 F.3d at 1344, that likely indicates a general purpose for the screening in contrast to, for example, requiring employees to be screened for exposure levels immediately upon leaving a work area in which they may have been exposed to radioactive materials.

2. Integrity Staffing further contends that even if

---

[4] That fact is not dispositive, however. As the government acknowledges, "[a]n activity can be integrally related to an employee's principal activities even if others must also engage in it" since "[o]therwise, an employer could evade its FLSA obligations by allowing an occasional visitor on the premises, subject to a requirement that almost always applies only to employees." Gov. Br. 30.

anti-theft screenings are closely related to employees' primary job duties of handling merchandise to distribute to Amazon.com customers, such screenings cannot constitute a compensable principal activity because "'not breaking the law'" cannot be "a principal job duty for which compensation must be paid." Pet. Br. 20. But that argument ignores *Steiner*'s observation that pre-shift and post-shift activities that are closely related to employees' primary job duties may be compensable even when they are not functionally required by the production process as long as they support an employer's managerial interest in "increas[ing] the efficiency of its operation." 350 U.S. at 251. Because Integrity Staffing has a very strong interest in preventing employee theft of its client's merchandise, which the anti-theft screening is designed to address, time spent by employees in that screening is compensable.

To illustrate, consider an employee working for a government contractor who is provided access to classified government material and is required not to remove that material from the workplace. The fact that removal of such material would place the employee in violation of his or her primary job duties – and perhaps of federal law – does not render a post-shift security screening of the employee's person and portable electronic devices for such classified material noncompensable; to the contrary, the fact that the purpose of the screening is "so directly related to the specific work the employee is employed to perform," 29 C.F.R. § 790.7(g) n.49, supports the conclusion that the screening is a compensable principal activity. The government contractor has a strong interest related to the efficiency of its operation – and to maintaining

its contract with the government – in strictly enforcing the rule prohibiting classified material from leaving the workplace, and the screening at issue is intended to achieve that interest in a manner that directly relates to the employee's primary job duties.

This same analysis applies in the more pedestrian context of a staffing agency's anti-theft screenings of its workers employed to perform work in the staffing agency's client's warehouse. Like a government contractor's screening of an employee who handles classified government material, a staffing agency's post-shift screening of employees who handle the warehouse client's valuable portable merchandise in order to deter employee theft is similarly "directly related to the specific work employee[s] [are] employed to perform," 29 C.F.R. § 790.7(g) n.49. As the employer *amici* make clear, the deterrence of employee theft "is a serious concern" with significant consequences for employers' profitability and competitiveness. Brief of Retail Litigation Center, Inc., et al. as *amici curiae*, 18-19. "Retailers attribute[] 44.2% of their inventory shrinkage to employee theft translat[ing] into an annual employee theft price tag of $15.9 billion," and "[t]he significant costs of employee theft are of course incorporated into . prices and passed on to consumers." *Ibid.* (internal quotation marks omitted). There can be no doubt, then, that screening to deter employee theft is so central to "the efficiency of [a staffing agency's] operation," *Steiner*, 350 U.S. at 251 – in particular, its interest in maintaining its business relationship with the client to whom it leases its employees – that, as long as the screening is closely related to employees' primary job duties, it is a compensable principal activity.

3. Finally, Integrity Staffing claims that "[t]ime spent waiting to clear security . is the modern equivalent of such quintessentially non-compensable time" "as 'checking in and out and waiting in line to do so,'" Pet. Br. 26 (quoting 29 C.F.R. § 790.7(g)), and is therefore noncompensable. This is just a variant on the company's principal argument that all screenings are *per se* noncompensable. As we have already shown, whether a particular screening constitutes a compensable principal activity is determined by how closely it relates to employees' primary job duties, not how long it takes to complete. Whether a particular screening bears some resemblance to checking in or out does not add anything to that analysis.

First, it is clear from this Court's decision in *IBP* that whether a particular activity constitutes a compensable principal activity turns on the nature of that activity and its relation to employees' primary job duties, not how long the activity takes. *Tum v. Barber Foods, Inc.*, No. 04-66, one of the two consolidated cases this Court decided in *IBP*, involved employees at a chicken processing plant who wore protective clothing and who "[a]t the end of the day, [we]re required to put their glove liners and lab coats in laundry bins" and "to put disposable items of clothing or equipment in trash bins." Brief for United States as *Amicus Curiae* Supporting Petitioners 5-6, *Tum v. Barber Foods, Inc.*, No. 04-66. Despite the few moments it took employees to complete this doffing, this Court nevertheless held that "[b]ecause doffing gear that is 'integral and indispensable' to employees' work is a 'principal activity' under the statute, the continuous workday rule mandates that time spent waiting to doff is not affected by the Portal-to-Portal Act and is

instead covered by the FLSA." *IBP*, 546 U.S. at 40. That is, even if the amount of time it takes for employees to pass through a security screen is similar to the time it takes employees to check out, "the amount of time devoted to an activity is not material in determining whether it is a principal activity that starts [or ends] the workday." Brief for United States as *Amicus Curiae* Supporting Petitioners 25, *Tum v. Barber Foods, Inc.*, No. 04-66.

Further, while the Department of Labor's regulations do not define the phrase "checking in and out," it is clear from the background law against which Congress enacted the Portal-to-Portal Act and the Department of Labor promulgated its regulations interpreting the Act that the phrase "checking in and out" was only intended to describe an employee reporting to work at the beginning of the work day and recording his or her departure at day's end, not a variety of other tasks that an employer may require an employee to complete after finishing his or her primary job duties.

The Department of Labor's interpretative regulations state that "checking in and out and waiting in line to do so" is one of the "types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered 'preliminary' or 'postliminary' activities." 29 C.F.R. § 790.7(g). What the Department very likely had in mind in 1947 when it referred to "the conditions normally present," *ibid.*, was the sort of checking in and out at issue in *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944), one of three decisions, along with *Ander-*

son v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), and *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 325 U.S. 161 (1945), which motivated Congress to enact the Portal-to-Portal Act. *See* S. Rep. No. 48, 80th Cong., 1st Sess., at 9-11 (Mar. 10, 1947) (discussing *Tennessee Coal, Mt. Clemens*, and *Jewell Ridge*). *Tennessee Coal* described a "check[ing] in" process in which employees "hang up individual brass checks on a tally or check-in board" for the purpose of "enabl[ing] the foreman and other officials to tell at a glance those individuals who have reported for work and those production and service crews that are incomplete and in need of substitutes," 321 U.S. at 594, a process that the court of appeals had held "should not be computed as work-time, since [it] fall[s] within the category of duties incident to qualifying the employee to perform his work rather than within the scope of his actual employment," *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 135 F.2d 320, 323 (5th Cir. 1943). The regulations' reference to "checking in and out" of the sort "performed under the conditions normally present," 29 C.F.R. § 790.7(g), then, refers to the limited activities of "report[ing] for work," *Tennessee Coal*, 321 U.S. at 594, and recording one's departure, acts that are only "incident to qualifying the employee to perform his work," *Tennessee Coal*, 135 F.2d at 323.

Like any activity performed before or after the regular work shift, however, "an activity which is a 'preliminary' or 'postliminary' activity under one set of circumstances may be a principal activity under other conditions." 29 C.F.R. § 790.7(h). Checking in or out is no exception. Thus, where an employer loads up the checking in or checking out process with activities

that range beyond the acts of punching a time clock or swiping an identification card to indicate that the employee "ha[s] reported for work," *Tennessee Coal*, 321 U.S. at 594, or recording his or her departure, the compensability of any additional activities added to the checking in or checking out process must be evaluated on their own terms.

For example, as the government acknowledges, *see* Gov. Br. 31-32 n.18, where construction employees are required to report to their employer's main office at the beginning of the workday to "fill[] out time sheets, material sheets, and supply and cash requisition sheets" before leaving for the job site, those activities are compensable notwithstanding the fact that they fulfill a checking-in function. *Dunlop v. City Elec., Inc.*, 527 F.2d 394, 397 (5th Cir. 1976). *See also Herman v. Rich Kramer Constr., Inc.*, No. 97-4308WMS, 1998 U.S. App. LEXIS 23329 (8th Cir., Sept. 21, 1998) (holding that "return[ing] to . headquarters after a day's work . . . [to] fill[] out time-sheets" is compensable as well). That is so because requiring "employees to complete paperwork about what they had done during their shift would generally be compensable," Gov. Br. 31-32 n.18, because it "enable[s] the employer to calculate his costs and to keep accurate records," *City Electric*, 527 F.2d at 400. These tasks, unlike mere checking in and checking out, are both closely related to the primary job duties employees undertake during the day and, from the employer's perspective, are vital to "increas[ing] the efficiency of its operation." *Steiner*, 350 U.S. at 251.

The Wage and Hour Division Opinion Letter cited by the government in its brief provides another helpful illustration of the distinction between the prelimi-

nary activity of checking in and compensable screening. *See* Gov. Br. 28-29 (discussing Opinion Letter from Wm. R. McComb, Adm'r, Wage & Hour Div., Dep't. of Labor, to A.M. Benson, Assistant, Office of the Chief of Ordnance, Dep't of the Army (April 18, 1951) (hereinafter, "McComb Op. Letter")). That letter concerns whether workers employed at an ordnance works "to produce smokeless and rocket powder" were entitled to compensation for time spent "go[ing] through a 'badge alley' where they obtain their badge and time card" and being subjected to a "search for matches, spark producing devices such as cigarette lighters, and other items which have a direct bearing on the safety of the employees and the Ordnance Works." McComb Op. Letter 1. The letter described "[t]he 'badge alley' operation [as] essentially a security matter since the record of hours worked at the work site is kept by the employee's immediate supervisor." *Id.* at 2. In contrast, "[t]he match inspection is essentially for safety reasons because the operation involves the production of explosives."[5] *Ibid.*

Although the Wage and Hour Administrator decided – without any analysis and without the benefit of this Court's subsequent decision in *Steiner* – that both "the time spent in the badge alley and security checks need not be counted by the employer as time worked," McComb Op. Letter 2, it is clear that this Court would have treated the match inspection in a

---

[5] The letter also states that employees were inspected when leaving the work site "for the purpose of preventing theft," McComb Op. Letter 2, but provides no explanation why that anti-theft inspection was necessary.

different manner than the process of picking up badges and time cards after *Steiner*. The Wage and Hour Administrator was correct that the "badge alley operation" was nothing more than a checking in process in the limited sense described in *Tennessee Coal* – analogous to "check[ing] in and hang[ing] up individual brass checks on a tally or check-in board" for the purpose of "enabl[ing] the foreman and other officials to tell at a glance those individuals who have reported for work," 321 U.S. at 594 – which, in the context of an ordnance works, was "a security matter," McComb Op. Letter 2. The "match inspection," in contrast, by the employer's own description, was required "for safety reasons because the operation involves the production of explosives." *Ibid.* Much like the showering and clothes-changing at issue in *Steiner*, the "search for matches, spark producing devices such as cigarette lighters, and other items have *a direct bearing on* the safety of the employees and the Ordnance Works." *Id.* at 1 (emphasis added). After *Steiner*, then, there can be little doubt that the "match inspection" was so closely related to the employees' primary productive activities "producing smokeless and rocket powder," *id.* at 1-2, that it constituted a compensable principal activity, even though it occurred shortly after the noncompensable activity of checking in.

C. As we have explained, the court of appeals correctly rejected the district court's conclusion that there is "a blanket rule that security clearances are noncompensable," holding instead that, like any other activity that employees are required to undertake before or after their primary productive activities, screenings must be "assess[ed] . . under the 'integral

and indispensable' test." *Integrity Staffing Solutions*, 713 F.3d at 531. Because Busk and Castro sufficiently pleaded – if just so – that their primary job duties were closely related to the anti-theft screenings at issue in this case, the court of appeals also correctly remanded this case back to the district court for further proceedings.

Federal Rule of Civil Procedure 8(a)(2) requires only that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." However, as this Court has made clear:

> "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations and quotation marks omitted).

In this case, then, the question, is whether Busk and Castro have pleaded "sufficient factual matter" to "allow[] the court to draw the reasonable inference that [Integrity Staffing] is liable," *ibid.*, under the FLSA for failing to pay them overtime for time spent in anti-theft screenings. In order to meet this standard, Busk and Castro were required to plead sufficient facts describing their primary job duties and the nature of the screenings so as to "allow[] the court to

draw the reasonable inference that [Integrity Staffing] is liable," *ibid.*, *i.e.*, that the screenings were "an integral and indispensable part of the principal activities for which [Busk and Castro] [we]re employed." *Steiner*, 350 U.S. at 256.

Busk and Castro have met this standard. As to their primary job duties, they pleaded that they were employed by Integrity Staffing as warehouse employees to "fulfill[] orders made by Amazon.com customers" by "walk[ing] throughout their respective warehouse facilities with collection carts and retriev[ing] products from the shelf and direct[ing] the product to be distributed to Amazon.com customers." JA 20. They have also pleaded that "it is an essential part of the job of a warehouse worker that they not take items from the warehouse out of the warehouse other than in the ways proscribed [sic] by the company," JA 21, and that "not contributing to 'shrinkage' and abiding by company procedures for inventory control is an integral aspect of the Plaintiff's job," *ibid.* As to the nature of the screenings, Busk and Castro pleaded that that they "and all other similarly-situated warehouse workers were required to go through a security search before leaving the facilities at the end of the day," *ibid.*, and that "[t]he search was to prevent employee theft," *ibid.*

The court of appeals correctly concluded that Busk and Castro's allegations that "Integrity . . requires the screening to prevent employee theft" and that the need for this screening "stems from the nature of the employees' work (specifically, their access to merchandise)," *Integrity Staffing Solutions*, 713 F.3d at 531, described a sufficiently close connection between the primary job responsibilities of employees

and the nature of the screening for purposes of *Steiner*'s "integral and indispensable" test to survive a motion to dismiss. Although it might have been preferable for Busk and Castro to have pleaded more detailed facts about their specific job duties as well as facts concerning whether all or only some employees were subject to the screening and where within the warehouse the screening took place – as such facts could support an inference that the screenings were closely related to the employees' primary job duties – the court of appeals did not err by reversing the district court's dismissal of Busk and Castro's claim on the ground that there is no "blanket rule that security clearances are noncompensable," *Integrity Staffing Solutions*, 713 F.3d at 531, and on the basis that Busk and Castro pleaded sufficient facts in support of their claim.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

Lynn K. Rhinehart
Harold C. Becker
James B. Coppess
Matthew J. Ginsburg
Counsel of Record
815 Sixteenth Street, NW
Washington, DC 20006
202-637-5397

AMICUS CURIAE BRIEF

No. 13-433

In The
Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC.,

Petitioner,

v.

JESSE BUSK and LAURIE CASTRO, on Behalf of Themselves and All Others Similarly Situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF FOR THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

ROBERTA L. STEELE
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
417 Montgomery Street
San Francisco, CA 94104
(415) 296-7629
rsteele@nelahq.org

PAUL W. MOLLICA*
OUTTEN & GOLDEN
203 North LaSalle Street, Suite 2100
Chicago, IL 60601
(312) 924-4888
pwmollica@outtengolden.com
**Counsel of Record*

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. WHILE THE PORTAL-TO-PORTAL ACT WAS INTENDED TO DISQUALIFY COMMUTING AND WAITING TIME, IT DID NOT EXCLUDE EXTRA WORK DUTIES PERFORMED AT THE CLOSE OF BUSINESS 4

II. LOSS PREVENTION IS INTEGRATED INTO THE MODERN AMERICAN WORK ROUTINE 6

III. LOSS PREVENTION MEASURES ARE "PRINCIPAL ACTIVITIES" 9

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946) 4, 5

Armour & Co. v. Wantock, 323 U.S. 126 (1944) 11

Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156 (2012) 2

Dunlop v. City Electric, Inc., 527 F.2d 394 (5th Cir. 1976) 11

EEOC v. Freeman, 961 F. Supp. 2d 783 (D. Md. 2013) 8

Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013) 2

IBP, Inc. v. Alvarez, 546 U.S. 217 (2005) 2, 5

Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011) 2

New Jersey v. T.L.O., 469 U.S. 325 (1985) 12

Sandifer v. United States Steel Corp., 134 S. Ct. 870 (2014) 2, 4

Steiner v. Mitchell, 350 U.S. 247 (1956) 2, 5

Tennessee Coal, Iron & Railroad v. Muscoda Local No. 123, 321 U.S. 590 (1944) 11

Terry v. Ohio, 392 U.S. 1 (1968) 12

United States v. Street, 614 F.3d 228 (6th Cir. 2010) 12

United States v. Zavala, 541 F.3d 562 (5th Cir. 2008) 12

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND OTHER AUTHORITIES:

29 U.S.C. § 254 .....2, 3, 4, 9

29 C.F.R. § 790.7(g).....11

29 C.F.R. § 790.8(a).....10, 12, 14

29 C.F.R. §§ 790.8(b)-(c).....2

EEOC, Enforcement Guidance No. 915.002, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.....9

ALAN GREGGO & MILLIE KRESEVICH, RETAIL SECURITY AND LOSS PREVENTION SOLUTIONS (2011).....6

PHILIP PURPURA, SECURITY AND LOSS PREVENTION, AN INTRODUCTION (6th ed. 2013).....7

CHARLES A. SENNEWALD AND JOHN H. CHRISTMAN, RETAIL CRIME, SECURITY, AND LOSS PREVENTION: AN ENCYCLOPEDIC REFERENCE (2008).....7

Leah Avey, *Walk to the Line, Compensable Time: Cash in the Pocket of Employees*, 32 Okla. City U. L. Rev. 135 (2007).....5

Craig Becker, *The Check is in the Mail: Timely Payment Under the Fair Labor Standards Act*, 40 UCLA L. Rev. 1241 (1993).....4

David R. Dorey, *The Unconstitutionality of Exit Searches*, 15 U. Pa. J. Const. L. 75 (2013).....12

TABLE OF AUTHORITIES – Continued

Page

Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 Buff. L. Rev. 53 (1991).....4, 5

Corey A. Ciocchetti, *The Eavesdropping Employer: A Twenty-First Century Framework for Employee Monitoring*, 48 Am. Bus. L.J. 285 (2011).....7

Lucas Loafman & Andrew Little Fiona, *Race, Employment, and Crime: The Shifting Landscape of Disparate Impact Discrimination Based on Criminal Convictions*, 51 Am. Bus. L.J. 251 (2014).....6

Sandra J. Mullings, *Employment of Ex-Offenders: The Time Has Come for a True Antidiscrimination Statute*, 64 Syracuse L. Rev. 261 (2014).....8, 9

2012 Report to the Nations, Ass'n of Certified Fraud Exam'rs (2012), available at http://www.acfe.com/rttn-highlights.aspx.....7

Fiona Briggs, *Fraud Costs US Retailers $54BN A Year, According to New Kount Volumatic 2013 Survey*, Kount (Oct. 7, 2013), available at http://www.kount.com/_blog/Press_Coverage/post/fraud-costs-usretailers-54-year-according.....6

Employment Screening Benchmarking Report, HireRight 20 (2013), available at https://www.eandi.org/PDF/HireRight_EmployBenchmarkReport_CPU6.13.pdf.....8

TABLE OF AUTHORITIES – Continued

Page

Kathy Grannis, *National Retail Security Survey: Retail Shrinkage Totaled $34.5 Billion in 2011*, Nat'l Retail Federation (June 22, 2012), available at http://blog.nrf.com/2012/06/22/national-retail-security-survey-retail-shrinkage-totaled-34-5-billion-in-2011/ 7

AMICUS CURIAE BRIEF FOR THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Employment Lawyers Association (NELA) advances employee rights and serves lawyers who advocate for equality and justice in the American workplace.[1] Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment, and civil rights disputes. NELA and its 69 circuit, state, and local Affiliates have more than 4,000 members nationwide committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly

---

[1] Pursuant to Supreme Court Rule 37.6, amicus represents that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a). Copies of the consent letters have been filed with the Clerk.

supports precedent-setting litigation affecting the workplace rights of individuals.

NELA's membership has an historical interest in wage-and-hour law, and has often filed amicus briefs in this Court on Fair Labor Standards Act issues. From recent terms, *see Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012); and *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011). NELA's members have fought efforts by employers in different guises to shift more and more of their financial burdens to—and reap the financial benefits of—unpaid labor.

SUMMARY OF ARGUMENT

The Portal-to-Portal Act (or "Act") provisions at 29 U.S.C. § 254, while excluding preliminary and postliminary events from the definition of "work," require payment for any task that forms an integral and indispensable part of employee's principal activity or activities (subject to exceptions not relevant here). *Steiner v. Mitchell*, 350 U.S. 247, 252-56 (1956). *Accord Sandifer v. United States Steel Corp.*, 134 S. Ct. 870, 876 (2014); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 37 (2005); 29 C.F.R. §§ 790.8(b)-(c). Little attention has been paid by Petitioner and its amici to the core question of whether participation in an employer's loss prevention policies might be a "principal activity" of Respondents, thus compensable.

Respondents contend not simply that they wait in line to check out and go home, but (as alleged in the complaint) that they are required to participate in a security program promulgated by Petitioner. First Am. Compl. ¶ 16, JA 21-22. This steers us outside of the zone of postliminary activity, and into compensable work.

The briefs supporting reversal of the Ninth Circuit's decision err in treating exit checks as mere traffic control, part of the employees' routine egress and severable from the "principal activity" of handling and packing merchandise. This view is detached from modern work reality. Loss prevention suffuses the American workplace and constitutes an ordinary duty of many modern retail American workers. Submitting to a search ordered by Petitioner, we submit, is the last principal activity of the day.

Petitioner merely seeks to leverage the Portal-to-Portal Act to shift the financial burden of its loss prevention program from its own ledger (e.g., by retaining more guards and equipment to cut down wait times) to its hourly-wage workers, obliging them to expend up to 25 minutes unpaid time to wait, empty out their pockets, and submit to searches. The Act, approved by Congress to end the controversial "portal" cases, nowhere ordains this result.

ARGUMENT

I. WHILE THE PORTAL-TO-PORTAL ACT WAS INTENDED TO DISQUALIFY COMMUTING AND WAITING TIME, IT DID NOT EXCLUDE EXTRA WORK DUTIES PERFORMED AT THE CLOSE OF BUSINESS.

Petitioner seeks to carve a rule out of the Portal-to-Portal Act that it may assign any manner of unpaid work, to be performed at the close of the shift, as long as it is arguably unconnected to the employees' principal activities. The Act's history belies this interpretation. Authoritative scholarship into the history underlying the Act reveals that the Eightieth Congress was addressing a particular kind of claim, portal claims, not at issue here. *See* Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 Buff. L. Rev. 53 (1991).

Congress's original failure to define the concept of FLSA "working time" (*Sandifer*, 134 S. Ct. at 875) led to litigation, in the years following its enactment, over which activities should be included in compensable time under the FLSA. The Portal-to-Portal Act of 1947 "derived its name from the primary concern that motivated amendment of the FLSA: claims to compensation for time expended by employees getting from the entrance of employers' premises to their work stations." Craig Becker, *The Check is in the Mail: Timely Payment Under the Fair Labor Standards Act*, 40 UCLA L. Rev. 1241, 1256 n.95 (1993). Congress intended to abrogate the Court's rulings in the Portal-to-Portal trilogy, culminating in *Anderson*

v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946), which held that the walk time from the time clock to the workbench was compensable.

The focus of this corrective legislation was circumscribed. *See, e.g.*, Leah Avey, *Walk to the Line, Compensable Time: Cash in the Pocket of Employees*, 32 Okla. City U. L. Rev. 135, 143-44 (2007) (citing limited purposes of extinguishing already-filed claims and limiting the prospective liability of employers for activities found to be compensable in *Anderson*). While some drafts of the bill would have wreaked major transformations to the FLSA (*see* Linder, *supra*, at 123-55), Congress ultimately left unaltered the broad definition of "work" adopted by the Court. *IBP, Inc.*, 546 U.S. at 28. Instead, it simply carved out "express exceptions for travel to and from the location of the employee's 'principal activity,' and for activities that are preliminary or postliminary to that principal activity." *Id.* The Court later held that "activities performed either before or after the regular work shift, on or off the production line" may be compensable, even with the revisions to the FLSA. *Steiner*, 350 U.S. at 256.

In sum, nothing in the Act's language or history suggests that Congress intended to grant a pass to employers to order that workers perform one free chore on their way home. Were Petitioner's view to prevail, what would keep them from next requiring employees to drop off book deliveries to their neighbors, on the theory that home deliveries are not

"integral and indispensable" to retrieving and packaging orders? It offers no principled stopping place.

II. LOSS PREVENTION IS INTEGRATED INTO THE MODERN AMERICAN WORK ROUTINE.

Petitioner and its amici blinker reality to argue that an employee's participation in loss prevention is neatly divisible from a retail worker's principal activities. Loss prevention is sewn into the lining of modern retail life. Such policies benefit employers by boosting profits. And employees cannot work with inventory unless they participate in these policies.

Retailers bemoan the cost of theft and fraud (U.S. Chamber of Commerce Amicus at 18-19; Nat'l Retail Fed'n Amicus at 1-2). Sources estimate losses to U.S. business from theft in tens of billions of dollars annually, with employees said to be accountable for a large share of that total. *See, e.g.*, ALAN GREGGO & MILLIE KRESEVICH, RETAIL SECURITY AND LOSS PREVENTION SOLUTIONS, 2 (2011) (42.7% of theft losses attributable to employee theft); Lucas Loafman & Andrew Little Fiona, *Race, Employment, and Crime: The Shifting Landscape of Disparate Impact Discrimination Based on Criminal Convictions*, 51 Am. Bus. L.J. 251, 296 (2014) ("[o]ne of the greatest financial problems businesses face today are losses due to theft and fraud"); Fiona Briggs, *Fraud Costs US Retailers $54BN A Year, According to New Kount Volumatic 2013 Survey*, Kount (Oct. 7, 2013), available at

http://www.kount.com/_blog/Press_Coverage/post/fraud-costs-usretailers-54-year-according/ (some 37% of losses attributable to employees); *2012 Report to the Nations*, Ass'n of Certified Fraud Exam'rs, 21 (2012), available at http://www.acfe.com/rttn-highlights.aspx (some 15% of losses by U.S. companies was because of non-cash theft); Kathy Grannis, *National Retail Security Survey: Retail Shrinkage Totaled $34.5 Billion in 2011*, Nat'l Retail Federation (June 22, 2012), available at http://blog.nrf.com/2012/06/22/national-retail-security-survey-retail-shrinkage-totaled-34-5-billion-in-2011/ (describing shrinkage as including employee theft, shoplifting, paperwork, or supplier fraud, with employee theft accounting for 44% of losses).

Companies have thus widely adopted loss prevention programs to plug revenue losses. CHARLES A. SENNEWALD AND JOHN H. CHRISTMAN, RETAIL CRIME, SECURITY, AND LOSS PREVENTION: AN ENCYCLOPEDIC REFERENCE, 302 (2008) (noting historic shift of asset security from apprehending employee thieves to "the concept of 'loss prevention'; i.e., the protection efforts . . directed toward shortage reduction, which in turn increases profitability"). They enlist a variety of strategies for combating inventory shrinkage—and one main tool is employee acquiescence in anti-theft measures. *See, e.g.*, PHILIP PURPURA, SECURITY AND LOSS PREVENTION, AN INTRODUCTION, 177 (6th ed. 2013) (reporting that numerous employers have established theft reporting programs, including tip- and hotlines for employees); Corey A. Ciocchetti, *The Eavesdropping*

Employer: A Twenty-First Century Framework for Employee Monitoring, 48 Am. Bus. L.J. 285, 308-09 (2011) (survey of pervasiveness of electronic workplace surveillance). Petitioner itself operates a hotline for its employees (1-855-727-6724) and tells them in its "New Associate Welcome Packet" to use it "for bringing to the Company's attention activity by individuals or groups that you think violate Integrity's code of conduct or external compliance regulations" (http://www.integritystaffing.com/PEPBrochure/PEP_IntegritySep13.pdf).

Retailers also screen job applicants for criminal history, a further sign that loss prevention is a more-than-incidental facet of employment. *EEOC v. Freeman*, 961 F. Supp. 2d 783, 785 (D. Md. 2013) ("For many employers, conducting a criminal history or credit record background check on a potential employee is a rational and legitimate component of a reasonable hiring process. The reasons for conducting such checks are obvious. Employers have a clear incentive to avoid hiring employees who have a proven tendency to defraud or steal from their employers, engage in workplace violence, or who otherwise appear to be untrustworthy and unreliable."); Employment Screening Benchmarking Report, HireRight 20 (2013), available at https://www.eandi.org/PDF/HireRight_EmployBenchmarkReport_CPU6.13.pdf (88% of survey respondents reported using criminal-background checks). Such screening comes even in the teeth of evidence that such policies fall hardest on minority applicants. *See* Sandra J. Mullings,

Employment of Ex-Offenders: The Time Has Come for a True Antidiscrimination Statute, 64 Syracuse L. Rev. 261, 271-75 (2014); EEOC, Enforcement Guidance No. 915.002, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

Thus, the reality is that retail employees such as Respondents are enmeshed in loss prevention. This is not merely a negative duty not-to-steal, as Petitioner would have it, but an affirmative obligation by workers to cooperate in loss-prevention activity.

III. LOSS PREVENTION MEASURES ARE "PRINCIPAL ACTIVITIES."

Based on the substance of the activity, loss prevention constitutes one of Respondents' principal activities under the Portal-to-Portal Act. In relevant part, Respondents allege that they

> were required to wait approximately 25 minutes each day at the end of each shift without any compensation in order to undergo a search for possible contraband or pilferage of inventory of his or her person. Defendants forced Plaintiffs and all other similarly situated warehouse workers to undergo a post 9/11 type of airport security clearance—i.e., warehouse employees were required to remove all personal belongings from their person such as wallets, keys, and belts, and pass through metal detectors

> before being released from work and allowed to leave the facility.

First Am. Compl., ¶ 16, JA 21-22 (emphasis added).

The parties and courts have taken different tacks on the issue of Respondents' principal activities. Initially, the district court held that their principal activity is "fulfilling online purchase orders," Pet. App. 27. The Ninth Circuit started with this premise, but concluded that security checks "stem[] from the nature of the employees' work," which requires "access to merchandise." Pet. App. 12. The Petitioner and amici argue that Respondents' primary duties exclusively concern retrieving and shipping merchandise. *See* Pet. Br. at 2 ("primary job duties involved retrieving items from inventory and packaging those items for delivery to Amazon.com customers"); U.S. Amicus at 8 (describing Respondents' "principal activity of filling orders" in the warehouse); *id.* at 21 (describing "principal activity" as "retrieving merchandise from the warehouse shelves to fill customers' orders").

Petitioner and its amici thus imply, erroneously, that employees' principal activities under the Portal-to-Portal Act are limited to one or maybe two main tasks. Yet, as the United States also observes (U.S. Amicus at 21), the relevant Department of Labor regulation, 29 C.F.R. § 790.8(a) declares that employees can have more than one principal duty, and such duties need not be preponderant. "[T]he plural form 'activities' in the statute makes it clear that in order

for an activity to be a 'principal' activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job." So it is not a complete answer for Petitioner to argue that Respondents occupy most of their time retrieving and filling customer orders. This does not preclude loss prevention as serving as yet another principal activity. *See, e.g., Dunlop v. City Electric, Inc.*, 527 F.2d 394, 398 (5th Cir. 1976) ("The legislative history and the administrative interpretations of the Portal-to-Portal Act support the view that the phrase 'activity or activities' was used to dispel the notion that any activities not inextricably tied to a single predominant principal activity could be considered noncompensable.").

The regulations expressly identify "checking in and out and waiting in line to do so" as noncompensable pre- or postliminary activities, but only "when performed under the conditions normally present." 29 C.F.R. § 790.7(g). Respondents allege more here. Turning out pockets, and exposing what would normally be zones of privacy, constitutes more than simply checking out of work. It easily fits the classical definition of "work" established by this Court under the FLSA, "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & Railroad v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). *See also Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) (work may also

include non-exertional acts, where "an employer may hire a man to do nothing, or to do nothing but wait for something to happen").

Indeed, we know that ordering employees to turn out their pockets for a search is no small matter. In Fourth Amendment parlance, it's a search or at least equivalent to a *Terry* stop. *See Terry v. Ohio*, 392 U.S. 1 (1968); *see also, e.g., United States v. Street*, 614 F.3d 228, 233-34 (6th Cir. 2010) ("an officer may not sidestep the requirements of the Fourth Amendment by directing a suspect to 'empty your pockets,' then disclaim any constitutional violation on the ground that he verbally directed the suspect to act without touching or in any way searching him"); *United States v. Zavala*, 541 F.3d 562, 576 n.4 (5th Cir. 2008) ("[u]nder *Terry*, the police officer could order Zavala to empty his pockets and place the contents on the roof of the Taurus to confirm that he was not carrying a weapon"). As this Court recognizes, *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985), "even a limited search of the person is a substantial invasion of privacy." *See* David R. Dorey, *The Unconstitutionality of Exit Searches*, 15 U. Pa. J. Const. L. 75 (2013) (arguing that exit checkpoints for government buildings are Fourth Amendment searches). However Petitioner might describe its exit searches, they cannot be written off as mere walk time.

The Department of Labor has provided relevant factors to consider (29 C.F.R. § 790.8(a)):

> Several guides to determine what constitute "principal activities" was [sic] suggested in

> the legislative debates. One of the members of the conference committee stated to the House of Representatives that "the realities of industrial life," rather than arbitrary standards, "are intended to be applied in defining the term 'principal activity or activities'," and that these words should "be interpreted with due regard to generally established compensation practices in the particular industry and trade." The legislative history further indicates that Congress intended the words "principal activities" to be construed liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed. A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered "sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work." [Footnotes omitted.]

As set forth above, participation in loss prevention is among "the realities of industrial life." Submitting to a search, moreover, constitutes "any work of consequence performed for an employer," insofar as searches constitute work and are solely for the employer's benefit.

Finally, Petitioner and amici urge that an "integral and indispensable" activity must be "closely or directly related to the proper performance of the employees' productive work." (U.S. Amicus at 8). *See also*

id. at 13 ("a compensable activity is one that bears a close or direct relationship to an employee's principal activities"); Pet. Br. at 19-20 ("What matters under this Court's precedents is whether the task is integral and indispensable to the employee's *productive work.*") (emphasis in original); *id.* at 24 (filling customer orders is "the 'productive work' and 'work of consequence,' *see* 29 C.F.R. § 790.8(a), for which Respondents were employed"); *id.* at 39 ("Respondents' 'work of consequence' and 'productive work' involved *filling customer orders*, not some abstract and amorphous 'access to merchandise'") (emphasis in original). Applying this standard, loss-prevention policies (such as exit searches) certainly count. Loss prevention is not only productive from the businesses' perspective, but Petitioner and amici (judging from their briefs) apparently deem loss-prevention policies essential. If these screening programs work as well as amici claim, they generate revenue for employer by plugging revenue losses. This is distinguishable from having employees idly wait for protective gear, or check out of their shift with swipe cards, which do not produce a direct financial benefit to the employer.

Should this Court affirm the Ninth Circuit's decision, the business of loss prevention will certainly continue as before. The only difference is that employees will be paid for their role in those policies, and employers will be financially motivated to explore and adopt more efficient ways to carry it out.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

ROBERTA L. STEELE
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
417 Montgomery Street
San Francisco, CA 94104
(415) 296-7629
rsteele@nelahq.org

PAUL W. MOLLICA*
OUTTEN & GOLDEN
203 North LaSalle Street,
Suite 2100
Chicago, IL 60601
(312) 924-4888
pwmollica@outtengolden.com
*Counsel of Record

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUN 04 2014
OFFICE OF THE CLERK

No. 13-433

IN THE

Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC.,
Petitioner,

v.

JESSE BUSK and LAURIE CASTRO, on behalf of themselves and all others similarly situated,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, GOVERNMENT FINANCE OFFICERS ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AND THE INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES IN SUPPORT OF PETITIONER

LISA SORONEN
Executive Director
STATE & LOCAL LEGAL CENTER
444 North Capitol Street NW
Suite 515
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

JAMES C. HO
Counsel of Record
ASHLEY E. JOHNSON
ANDREW P. LEGRAND
GIBSON, DUNN & CRUTCHER LLP
2100 McKinney Avenue
Dallas, TX 75201
(214) 698-3100
jho@gibsondunn.com

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. ONLY THOSE ACTIVITIES THAT ARE BOTH "INTEGRAL" AND "INDISPENSABLE" TO PRINCIPAL WORK ACTIVITIES ARE COMPENSABLE.	6
II. A WATERED DOWN TEST FOR "INTEGRAL AND INDISPENSABLE" ACTIVITIES WILL HURT EMPLOYERS AND CAUSE A FLOOD OF FLSA LITIGATION.	12
III. STATE AND LOCAL GOVERNMENT WILL FACE PARTICULAR HARM UNLESS THE BIPARTITE TEST IS REAFFIRMED.	15
CONCLUSION	21

TABLE OF AUTHORITIES

CASES	Page(s)
Allison v. Amazon.com, Inc., No. 2:13-cv-1612 (W.D. Wash. Sept. 6, 2013)	14
Alvarez v. IBP,Inc., No. CT-98-5005-RHW, 2005 WL 3941313 (E.D. Wash. Dec. 20, 2005)	13
Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946)	5, 8
Bamonte v. City of Mesa, 598 F.3d 1217 (9th Cir. 2010)	7, 8
Bonilla v. Baker Concrete Const., Inc., 487 F.3d 1340 (11th Cir. 2007)	9, 10
Craig v. Rite Aid Corp., 13 N.W. Pers. Injury Litig. Rep. 53, 2013 WL 1397751 (M.D. Pa. Jan. 7, 2013)	13
Davis v. Amazon.com, Inc., No. 3:13-cv-1091 (M.D. Tenn. Oct. 4, 2013)	14
Franklin v. Kellogg Co., 619 F.3d 604 (6th Cir. 2010)	9
Frlekin v. Apple, Inc., No. 3:13-cv-3451 (N.D. Cal. July 25, 2013)	14
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)	20
Gibson v. Amazon.com, Inc., No. 3:13-cv-1136 (M.D. Tenn. Oct. 11, 2013)	14

TABLE OF AUTHORITIES—Continued

Page(s)

Gorman v. Consol. Edison Corp.,
488 F.3d 586 (2d Cir. 2007) ..... *passim*

Harvey v. AB Electrolux,
No. C11-3036-MWB, 2014 WL 1696134
(N.D. Iowa Mar. 28, 2014) 8

Hultgren v. Cnty. of Lancaster, Neb.,
913 F.2d 498 (8th Cir. 1990) 11

IBP v. Alvarez,
546 U.S. 21 (2005) 7, 9, 11, 12

Johnson v. Amazon.com, Inc.,
No. 1:13-cv-153 (W.D. Ky. Sept. 17, 2013). 14

Kalin v. Apple, Inc.,
No. 3:13-cv-04727 (N.D. Cal. Oct. 10, 2013) 14

Kilker v. Apple, Inc.,
No. 3:13-cv-3775 (N.D. Cal. Aug. 14, 2013) 14

Mitchell v. King Packing Co.,
350 U.S. 260 (1956) 7, 11, 12

Morgan v. Family Dollar Stores, Inc.,
551 F.3d 1233 (11th Cir. 2008) 13

Musticchi v. City of Little Rock, Ark.,
734 F Supp. 2d 621 (E.D. Ark. 2010) 8, 11

Rosenthal v. Amazon.com, Inc.,
No. 1:13-cv-1701 (D. Del. Oct. 15, 2013) 15

Perez v. Mountaire Farms, Inc.,
650 F.3d 350 (4th Cir. 2011) 9

Sandifer v. U.S. Steel Corp.,
134 S. Ct. 870 (2014) 6, 12

TABLE OF AUTHORITIES—Continued

Page(s)

Schwartz v. Victory Sec. Agency, LP, No. 11-cv-0489, 2011 WL 2437009 (W.D. Pa. June 14, 2011) 8

Steiner v. Mitchell, 350 U.S. 247 (1956) ..... *passim*

Steiner v. Mitchell, 215 F.2d 171 (6th Cir. 1954) 6

Suggars v. Amazon.com, Inc., No. 3:13-cv-906 (M.D. Tenn. Sept. 9, 2013) 14

Tenn. Coal Co. v. Muscoda Local, 321 U.S. 590 (1944) 8

Vance v. Amazon.com, Inc., No. 3:13-cv-765 (W.D. Ky. Aug. 1, 2013) ... 14

STATUTES

29 C.F.R. § 785.35 4

29 U.S.C. § 207(k) 20

29 U.S.C. § 207(o) 20

29 U.S.C. § 254(a)(2) 6

Pub L. No. 99–150, 99 Stat. 787 (1985) 20

Fla. Admin. Code R. 33-208.002 17

Tenn. Code Ann. § 41-1-102 17

RULES

Merced Cnty. Super. Ct. R. 418(A) 17

Washington Courthouse Mun. Ct. Local R. 54.1 17

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

9th Circuit Court of Appeals Says Amazon's Warehouse Workers Must Be Paid for Security Check Point Time, BUSINESS WIRE, (Apr. 12, 2013 6:57 PM) 18

131 Cong. Rec. 4191-01 (1985) 20

Alexander E.M. Hess, *The 10 Largest Employers in America,* USA TODAY (Aug. 22, 2013, 7:48 AM)..... 16

Biggest Municipal Bankruptcies in U.S. History, FORBES, *available at* http://www.forbes.com/pictures/ejii45efkm/the-5-biggest-municipalbankruptcies-in-u-s-history/ (last visited Oct. 30, 2013)..... 19

CITY OF GARLAND, PURCHASING, webpage, *available at* http://www.ci.garland.tx.us/gov/lq/purchasing/default.asp (last visited May 31, 2014) 16

CITY OF SAVANNAH, PURCHASING, webpage, *available at* http://savannahga.gov/index.aspx?nid=491 (last visited May 31, 2014) ... 16

CITY OF SCOTTSDALE, PURCHASING, webpage, *available at* http://www.scotts daleaz.gov/departments/adminservices/purchasing (last visited May 31, 2014) 16

DEIRDRE BAKER, ANNUAL SURVEY OF PUBLIC EMPLOYMENT & PAYROLL SUMMARY REPORT: 2011 (Aug. 22, 2013).....16, 18

TABLE OF AUTHORITIES—Continued

Page(s)

Elizabeth Erickson & Ira Mirsky, *Employers Responsibilities When Making Settlements in Employment-Related Claims*, BLOOMBERG LAW REPORTS (2009) 13

FLSA Cases in Federal Court, SEYFARTH SHAW LLP (2012) 15

I.B.M. Agrees to Pay $65 Million to Settle Dispute on Overtime, N.Y. TIMES (Nov. 23, 2006) 13

Jake Zamansky, *Investors Face Potential Municipal Bond Armageddon*, FORBES (Apr. 25, 2013, 11:03 AM), *available at* http://www.forbes.com/sites/jakezamansky/2013/04/25/investors-face-potential-municipal-bondarmageddon 19

John Zappe, *Supreme Court to Decide if Security Check Time is Compensable*, ERE (Mar. 4, 2014) 12

MADISON CNTY., ALA., PURCHASING DEP'T., webpage, *available at* http://madisoncountyal.gov/about/org/CoDepts/Purchasing.shtml (last visited May 31, 2014) 16

Margaret Cronin Fisk, *Wal-Mart Will Pay Up to $640 Million in Settlement*, BLOOMBERG (Dec. 23, 2008, 6:57 PM), ... 13

NAT'L ASS'N OF ST. PROCUREMENT OFFICIALS webpage, *available at* http://www.naspo.org (last visited May 31, 2014); 16

TABLE OF AUTHORITIES—Continued

Page(s)

OKLA. CENT. PURCHASING DIV., web-page, *available at* http://www.ok.gov/DCS/Central_Purchasing (last visited May 31, 2014)..... 16

Phil Oliff, Chris Mai & Vincent Palacios, *States Continue to Feel Recession's Impact*, CENTER ON BUDGET AND POLICY PRIORITIES (Jun. 27, 2012) 18

S. Rep. No. 99-159 (1985) 19

SALT LAKE CNTY., CONTRACTS AND PROCUREMENT, webpage, *available at* http://admin.slco.org/contracts/puSurplusWarehouseInfo.aspx (last visited May 31, 2014) ... 16

Smith Barney to Settle Brokers' Overtime Suit, L.A. TIMES (May 24, 2006) 13

STATE BUDGET CRISIS TASK FORCE, FINAL REPORT (2014)..... 19

TARRANT CNTY., PURCHASING DEP'T, webpage, *available at* https://www.tarrantcounty.com/ePurchasing/site/default.asp (last visited May 31, 2014) 16

TENN. DEP'T OF GEN. SERVS., CENT. PROCUREMENT OFF. webpage, *available at* http://tn.gov/generalserv/cpo (last visited May 31, 2014);..... 16

TABLE OF AUTHORITIES—Continued

Page(s)

U.S. COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS–FINAL REPORT 49 (Dec. 1, 1994) 14

U.S. GAO, FAIR LABOR STANDARDS ACT: THE DEPARTMENT OF LABOR SHOULD ADOPT A MORE SYSTEMATIC APPROACH TO DEVELOPING ITS GUIDELINES 6 (2013) 15

U.S. GOA, STATE AND LOCAL GOVERNMENTS' FISCAL OUTLOOK APRIL 2013 UPDATE 1 (2013), *available at* http://www.gao.gov/assets/ 660/654255.pdf 19

BRIEF FOR *AMICI CURIAE* NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, GOVERNMENT FINANCE OFFICERS ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, AND THE INTERNATIONAL PUBLIC MANAGEMENT ASSOCIATION FOR HUMAN RESOURCES IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[*]

The National League of Cities, the National Association of Counties, the International City/County Management Association, the U.S. Conference of Mayors, the International Municipal Lawyers Association, the Government Finance Officers Association, the National Public Employer Labor Relations Association, and the International Public Management Association for Human Resources respectfully submit this *amici curiae* brief in support of Petitioner. *Amici* seek to offer additional reasons that this Court should reverse the Ninth Circuit's unduly broad construction of the Fair Labor Standards Act, as amended by the Portal-to-Portal Act.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and gov-

---

[*] Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *amicus* brief.

ernance. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization consisting of more than 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The Government Finance Officers Association (GFOA) is the professional association of state, provincial, and local finance officers in the United States and Canada. GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its 18,000 members are dedicated to the sound management of government financial resources.

The National Public Employer Labor Relations Association (NPELRA) is a national organization for public sector labor relations and human resources professionals. NPELRA is a network of state and regional affiliations, with over 2,300 members, that represents agencies employing more than 4 million federal, state, and local government workers in a wide range of areas. NPELRA strives to provide its members with high quality, progressive labor relations advice that balances the needs of management and the public interest, to promote the interests of public sector management in the judicial and legislative areas, and to provide networking opportunities for members by establishing state and regional organizations throughout the country.

The International Public Management Association for Human Resources (IPMA-HR) represents human resource professionals and human resource departments at the federal, state, and local levels of government. IPMA-HR was founded in 1906 and currently has over 8,000 members. IPMA-HR promotes public-sector human resource management excellence through research, publications, professional development and conferences, certification, assessment, and advocacy.

Amici curiae have a strong interest in apprising the Court of the significant adverse consequences facing the nation's state and local governments if the decision below is allowed to stand. As *amici* argue below, the Ninth Circuit's decision substantially departs from this Court's precedent, and it has far-reaching consequences for employers struggling to manage the effects of the Great Recession. Unless the Ninth Circuit's decision is reversed, state and local governments, which collectively are the nation's largest employer, might be pushed to the financial brink by unanticipated and unbudgeted claims for compensation for preliminary or post-

liminary activities that are not an "integral" part of their employees' principal work.

SUMMARY OF ARGUMENT

This Court has repeatedly held that only those preliminary and postliminary activities that are "integral and indispensable" to an employee's principal work activities are compensable under the Fair Labor Standards Act (FLSA), as amended by the Portal-to-Portal Act. The Ninth Circuit interpreted this standard as reaching all activities that are "necessary" and "done for [the employer's] benefit." Pet. Br. 15. As a result, the Ninth Circuit held that the time employees spend in a security screening after their principal work is completed is compensable under the FLSA.

The Ninth Circuit's expansive reading of "integral and indispensable" activities sweeps broadly, encompassing even basic non-principal and indisputably non-compensable activities—like home-to-work commuting. *See* 29 C.F.R. § 785.35 ("Normal travel from home to work is not worktime."). But just as an employer typically does not hire employees to commute to and from work, an employer does not hire employees to pass through security screening. Both home-to-work commuting and passing through security are "necessary" in the sense that they are required to get to or from the workplace at the beginning or end of the workday. Likewise, they both are done for the benefit of the employer. However, neither is "integral" to an employee's principal work activities. As a result, neither should be compensable.

By reducing the "integral and indispensable" test to simply an inquiry into whether the activity is necessary and for the employer's benefit, the Ninth Circuit's analysis strips the "integral" component from what courts widely agree is a bipartite test. *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 592–93 (2d Cir. 2007); *see also Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). But "'indispensable' is not synonymous with 'integral.'" *Gorman*, 488 F.3d at 592. As with

the activities excluded from compensation by this Court in *Steiner*, security screenings might be "indispensable," in the sense of being necessary to begin or end the workday, but such screenings are not "integral" to principal work activities—that is, they are not "so closely related to other duties performed . as to be an integral part thereof." *See Steiner*, 350 U.S. at 252. By eliminating the requirement that the security screening be "integral" to the employees' principal activity, the Ninth Circuit broadens compensable activities to the scope adopted by this Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), a scope intentionally *reversed* by Congress through the Portal-to-Portal Act.

The Ninth Circuit's watered-down compensability test is a boon for those employees and lawyers who want to expand the FLSA's reach and extract undue sums from employers despite Congress's clearly expressed intent to shrink employer liability for non-principal work activities under the Portal-to-Portal Act. The decision encourages litigation over even the most mundane and inconsequential tasks, which traditionally have been understood to be non-compensable, on the mere prospect that such activities might be deemed "necessary" and "done for the benefit of the employer."

But neither litigation nor expansion of FLSA coverage is costless. And the burden of these additional and unexpected costs will fall on employers—employers like *amici*'s members and partners, the state and local governments that are, collectively, the nation's largest employer. Yet those entities are already struggling to claw out of prolonged budget crises caused by the Great Recession. With financial obligations continuing to outpace tax revenue, state and local governments face a particular and peculiar risk if the Ninth Circuit's decision is allowed to stand.

Amici therefore respectfully request that this Court reverse the Ninth Circuit's decision and reiterate that the "integral and indispensable" test is a bipartite one. In so doing,

this Court will reassure employers across the country that they will not be on the hook, legally or financially, for the few minutes each day that some employees spend passing through security to enter or leave work.

ARGUMENT

I. ONLY THOSE ACTIVITIES THAT ARE BOTH "INTEGRAL" *AND* "INDISPENSABLE" TO PRINCIPAL WORK ACTIVITIES ARE COMPENSABLE.

1. Just last term, this Court reaffirmed the longstanding rule that activities are compensable under the FLSA only if those activities are "integral and indispensable" to an employee's principal work activities. *Sandifer v. U.S. Steel Corp.*, __ U.S. __, 134 S. Ct. 870, 876 (2014). This formulation is a judicially crafted attempt to draw the line between the "principal activity or activities" of an employee and "activities which are preliminary to or postliminary to said principal activity or activities," the latter of which the statute specifically designates non-compensable. 29 U.S.C. § 254(a)(2); *see also Steiner*, 350 U.S. at 256. If an activity is "'an integral and indispensable part of the principal activities,'" it is fairly encompassed within the term "principal activity or activities." *Steiner*, 350 U.S. at 252-53 (quoting *Steiner v. Mitchell*, 215 F.2d 171, 175 (6th Cir. 1954).

Both aspects of the test—*i.e.*, "integral" and "indispensable"—have independent meaning. This Court made that clear in *Steiner*, where the Court applied the "integral and indispensable" test to hold that battery plant workers who were required to change into protective gear before each shift and shower and change out of the gear at the end of the shift were entitled to compensation. 350 U.S. at 256. This Court explained that Congress intended such activities to be compensable if they were "essential to the principal activities of

the employees"—*i.e.*, "indispensable"—*and* "an integral part of" those activities. *Id.* at 254.

Similarly, in *Mitchell v. King Packing Co.*, the Court determined that knife sharpening by knifemen was compensable. To reach that conclusion, it reasoned that the knives were required to "be 'razor sharp' for the proper performance of the work." *Mitchell*, 350 U.S. at 262. That is, the sharpening of the knives was necessary, or "indispensable." But the Court also concluded that, upon hiring, "it is understood that [a knifeman] will be required to sharpen knives," a task which he is "expected to perform as well as other tasks connected with the job." *Id.* In other words, sharpening knives is an integral part of a knifeman's job.

Finally, in *IBP v. Alvarez*, the Court denied compensation for employees' time "waiting to don integral and indispensable gear" because that waiting time itself was "certainly not 'integral and indispensable' in the same sense that the donning is." 546 U.S. 21, 40 (2005). The Court specifically acknowledged that "the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are 'integral and indispensable' to a 'principal activity' under *Steiner*." *Id.* at 40-41. Instead, because the predonning "waiting" was "two steps removed from the productive activity on the assembly line," it was not compensable. *Id.* at 40, 42.

It is thus no surprise that courts have consistently understood this Court's precedent to dictate that the "integral and indispensable" test is a bipartite one, under which "'[i]ndispensable' is not synonymous with 'integral.'" *Gorman*, 488 F.3d at 592. *See also Bamonte v. City of Mesa*, 598 F.3d 1217, 1232 (9th Cir. 2010) ("[T]here is a difference between an indispensable activity and an integral activity. That an activity is indispensable does not necessarily mean that the activity is integral to the principal work performed."). An activity must be (1) "indispensable" or "necessary," and (2)

"integral," or "so closely related to other duties performed as to be an integral part thereof." *Steiner*, 350 U.S. at 252; *see also, e.g.*, *Musticchi v. City of Little Rock, Ark.*, 734 F. Supp. 2d 621, 630–32 (E.D. Ark. 2010) (holding that an indispensable job duty was not compensable because it was not integral to the plaintiffs' principal duties); *Schwartz v. Victory Sec. Agency, LP*, No. 11-cv-0489, 2011 WL 2437009, at *5 (W.D. Pa. June 14, 2011); *Harvey v. AB Electrolux*, No. C11-3036-MWB, 2014 WL 1696134, at *17 (N.D. Iowa Mar. 28, 2014) ("Courts, however, do not view these two terms as synonymous."); *Bamonte*, 598 F.3d at 1225.

2. The Ninth Circuit veered sharply from this bipartite approach in its analysis of whether the security screening at issue in this case is "integral and indispensable" to the principal work activities of the warehouse employees who "fill[] orders placed by Amazon.com customers." Pet. Br. 12. Although it recited the "integral and indispensable" standard, the court pared the inquiry to only one of the two relevant questions, asking whether the security screening was "necessary" and done for the "benefit of the employer." Pet. Br. 13. Noticeably absent from this analysis is any consideration of whether the security screen is "so closely related" to the warehouse employees' principal activities "as to be an integral part thereof." *Steiner*, 350 U.S. at 252.

With the "integral" prong thus excised, the Ninth Circuit's test closely parallels the test adopted in *Anderson* and superseded by the Portal-to-Portal Act. *Anderson* held that the time employees spent walking to their stations was compensable precisely because that walking was compelled "by the necessities of the employer's business" and was "'pursued necessarily and primarily for the benefit of the employer and his business.'" *Anderson*, 328 U.S. at 691-92 (quoting *Tenn. Coal Co. v. Muscoda Local*, 321 U.S. 590, 598 (1944)). The Portal-to-Portal Act repudiated this approach, and *Steiner* replaced it with the two-prong "integral and in-

dispensable" standard that the Ninth Circuit failed to properly apply. *See IBP*, 546 U.S. at 34–35.

3. The significance of the Ninth Circuit's elimination of the "integral" requirement is evident in the fact that it found the security screening here compensable, after well-reasoned decisions from the Second and Eleventh Circuits found security screenings *not* compensable. The Second and Eleventh Circuits both read *Steiner* and the Portal-to-Portal Act narrowly and gave due weight to the "integral" component of the bipartite test. *Gorman*, 488 F.3d at 591; *Bonilla v. Baker Concrete Const., Inc.*, 487 F.3d 1340, 1345 (11th Cir. 2007); *see also Franklin v. Kellogg Co.*, 619 F.3d 604, 619 (6th Cir. 2010); *Perez v. Mountaire Farms, Inc.*, 650 F.3d 350, 365 (4th Cir. 2011).

In *Gorman*, the Second Circuit held that time spent traversing security screening is not compensable because "'[i]ntegral' means, *inter alia*, 'essential to completeness'; 'organically joined or linked'; 'composed of constituent parts making a whole,'" and time the employees spent passing through security "while arguably indispensable," or "necessary," was "not integral" because such activities are "modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act, in particular, travel time." 488 F.3d at 592-93.

In *Bonilla*, the Eleventh Circuit, like the Second Circuit in *Gorman*, emphasized that a claim of "necessity" does not suffice to demonstrate that an activity is integral and indispensable, because "[i]f mere causal necessity was sufficient to constitute a compensable activity, all commuting would be compensable because it is a practical necessity for all workers to travel from their homes to their jobs." *Bonilla*, 487 F.3d at 1244.

The Ninth Circuit sidestepped *Gorman* and *Bonilla*, finding that the determinative fact here is that the security screening is to reduce "shrinkage," and so it is done for In-

tegrity's "benefit." Pet. Br. 13. In other words, if the purpose of security screening is to reduce theft, the time spent passing through security is compensable. But if the purpose is to ensure safety and security, the time is not compensable.

But neither the term "integral" nor the term "indispensable" incorporates an intent requirement. An employee's activity is no more "necessary" to, or an integral part of, that employee's principal activity simply because of the reason the activity is undertaken. *See Gorman*, 488 F.3d at 593 (recognizing that the scope of the Portal-to-Portal Act "does not depend on the *purpose* of any preliminaries" or postliminaries) (emphasis added).[1]

Moreover, focusing on intent would lead to absurd results. Under such an approach, two employees who work in different buildings, but for the same employer and doing the same principal activities, might be compensated differently for an identical preliminary or postliminary activity. For example, a clerical worker in a county's procurement facility, who passes through a security screening to prevent shrink-

---

[1] Nor does it matter whether or not everyone entering the workplace, or just those handling the Amazon.com products, went through the security screening. The Ninth Circuit attempted to distinguish *Gorman* and *Bonilla* on this ground, stating that in those cases, "everyone who entered the workplace had to pass through a security clearance." Pet. Br. 40. But the ubiquity of security screenings is of no consequence: an activity is either so much a part of, and necessary to, a principal activity to be "integral and indispensable," or it is not. Moreover, even if ubiquitous security screenings were less "integral and indispensable" to principal duties than targeted screenings, Respondent has not established that *only* members of the putative class–and not others leaving the warehouse floor–were subject to the security screenings here. In fact, the Class Action Complaint does not make this allegation. *See also* Pet. Br. at 41 ("Tellingly, neither the Ninth Circuit nor the Respondents cite *anything* in support of their suggestion that only certain employees are subject to security screenings.") (emphasis in original).

age, would be compensated. But a clerical worker in the county's courthouse, who must clear a security screening designed to ensure the safety and security of a sensitive facility, would not. In both scenarios, the employer benefits: the "shrinkage" screening protects its financial resources; the "safety" screening protects its people.

What should control is "common sense and the general concept of work or employment." *Hultgren v. Cnty. of Lancaster, Neb.*, 913 F.2d 498, 504 (8th Cir. 1990). A construction of "integral and indispensable" that makes some security screenings compensable and others non-compensable distorts the traditional notion of work, and it defies common sense.

4. When evaluated for satisfaction of the "integral" requirement, rather than simply the "indispensable" requirement, the security screenings here fail to meet the test. There is nothing about removing personal belongings from one's pockets and walking through a metal detector that can be characterized as "organically joined or linked" to retrieving items from inventory and filling customers' online orders. *See Gorman*, 488 F.3d at 592. The screenings are certainly not "*always* essential if the [warehouse worker] is to do his job." *IBP*, 546 U.S. at 40 (emphasis in original). Nor would it be naturally "understood" by a newly hired employee that passing through security screening was a logical part of a job filling customer orders in the same way that a newly hired knifeman would be well aware his knife must be sharpened. *See Mitchell*, 350 U.S. at 262.

If the metal detectors used to conduct the security screenings malfunctioned, the workday surely would not end. *Accord Musticchi*, 734 F. Supp. 2d at 631 ("[U]nlike a butcher sharpening a knife or an x-ray technician powering and testing an x-ray machine, [ ] officers can successfully perform their jobs without polishing and cleaning their uniform and equipment.").

Although "necessary" and done for Integrity's "benefit," the after-hours, off-floor security screenings—like the "pre-donning waiting" in *IBP*—are "two steps removed from the productive activity" in the warehouse, "and thus not "integral" to the plant workers' principal activities. *See IBP*, 546 U.S. at 40, 42. This Court should apply the narrow, bipartite test articulated in *Steiner*, and reaffirmed in *Mitchell*, *IBP*, and *Sandifer*. Doing so would inexorably lead to one conclusion: security screenings are not "integral and indispensable" to warehouse workers' principal activities. The Ninth Circuit's decision cannot stand.

II. A WATERED DOWN TEST FOR "INTEGRAL AND INDISPENSABLE" ACTIVITIES WILL HURT EMPLOYERS AND CAUSE A FLOOD OF FLSA LITIGATION.

The Ninth Circuit's decision poses a significant and immediate threat to employers: the cost of defending against the flood of litigation that will inevitably follow combined with the cost of unprecedented FLSA exposure. Because many FLSA suits are filed as collective actions representing hundreds or thousands of plaintiffs, each new suit represents millions or hundreds of millions of dollars in potential liability and litigation expenses for employers.

Respondents' counsel estimates that this case alone represents "hundreds of millions of dollars" in potential liability.[2] This projection is not farfetched. In 2009, the average compensatory award, excluding attorneys' fees, in all federal court employment cases was more than $490,000, a 45% increase since 2000. Today, "[i]n any employment case filed

---

[2] John Zappe, *Supreme Court to Decide if Security Check Time is Compensable*, ERE (Mar. 4, 2014), http://www.ere.net/2014/03/04/supreme-court-to-decide-if-security-check-time-is-compensable/.

in federal court, there is a 16% chance the award (excluding attorney fees) will exceed $1 million, and a 67% chance that the award will exceed $100,000."[3] The cost of settling can be equally devastating, as it has "tripled during the past five years, to an average of more than $300,000."[4] Many cases result in far more liability, such as recent collective action settlements ranging from $65 million to $640 million.[5]

Cases litigated to final judgment have had similar results. *See, e.g.*, *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1240, 1285 (11th Cir. 2008) (affirming a final judgment of more than $35 million against Family Dollar Stores in a FLSA collective action brought by 1,424 store managers seeking overtime compensation); *Alvarez v. IBP, Inc.*, No. CT-98-5005-RHW, 2005 WL 3941313, at *1 (E.D. Wash. Dec. 20, 2005) (awarding plaintiffs over $9 million in damages, costs, and attorneys' fees).

These figures capture only a small fraction of the actual expense associated with defending against FLSA suits. A report prepared by the Dunlop Commission, at the behest of

---

3 Elizabeth Erickson & Ira Mirsky, *Employers Responsibilities When Making Settlements in Employment-Related Claims*, BLOOMBERG LAW REPORTS (2009), http://www.mwe.com/info/pubs/Bloomberg_Employers.pdf.

4 *Id.*

5 *I.B.M. Agrees to Pay $65 Million to Settle Dispute on Overtime*, N.Y. TIMES (Nov. 23, 2006), http://www.nytimes.com/2006/11/23/technology/23IBM.html; *Smith Barney to Settle Brokers' Overtime Suit*, L.A. TIMES (May 24, 2006), http://articles.latimes.com/2006/may/24/business/fi-wrap24.2; Margaret Cronin Fisk, *Wal-Mart Will Pay Up to $640 Million in Settlement*, BLOOMBERG (Dec. 23, 2008, 6:57 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aX6vHzFR2avg; *Craig v. Rite Aid Corp.*, 13 N.W. Pers. Injury Litig. Rep. 53, 2013 WL 1397751 (M.D. Pa. Jan. 7, 2013 (reporting a $20.9 million settlement of a FLSA collective action and state law class action).

the Secretary of Labor and the Secretary of Commerce, found that, in employment litigation cases, "[f]or every dollar paid to employees through litigation, at least another dollar is paid to attorneys involved in handling both meritorious and non-meritorious claims."[6] And that does not include the costs borne by employers to ensure they are FLSA compliant: "employers often dedicate significant sums to designing defensive personnel practices to minimize their litigation exposure." *Id.*

By defining "integral and indispensable" so expansively that the Respondents here may advance a claim that has been uniformly rejected in other circuits, the Ninth Circuit opened the floodgates to a new torrent of FLSA litigation. In fact, in the six months following the Ninth Circuit's decision, at least ten FLSA collective actions seeking compensation for time spent in security screenings were filed in federal courts. *See, e.g.*, *Frlekin v. Apple, Inc.*, No. 3:13-cv-3451 (N.D. Cal. July 25, 2013); *Vance v. Amazon.com, Inc.*, No. 3:13-cv-765 (W.D. Ky. Aug. 1, 2013); *Kilker v. Apple, Inc.*, No. 3:13-cv-3775 (N.D. Cal. Aug. 14, 2013); *Allison v. Amazon.com, Inc.*, No. 2:13-cv-1612 (W.D. Wash. Sept. 6, 2013); *Suggars v. Amazon.com, Inc.*, No. 3:13-cv-906 (M.D. Tenn. Sept. 9, 2013); *Johnson v. Amazon.com, Inc.*, No. 1:13-cv-153 (W.D. Ky. Sept. 17, 2013); *Davis v. Amazon.com, Inc.*, No. 3:13-cv-1091 (M.D. Tenn. Oct. 4, 2013); *Kalin v. Apple, Inc.*, No. 3:13-cv-04727 (N.D. Cal. Oct. 10, 2013); *Gibson v. Amazon.com, Inc.*, No. 3:13-cv-1136 (M.D. Tenn. Oct. 11, 2013);

---

6 U.S. COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS–FINAL REPORT 49 (Dec. 1, 1994), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace.

Rosenthal v. Amazon.com, Inc., No. 1:13-cv-1701 (D. Del. Oct. 15, 2013).

If past is prologue, this consequence should have been expected. The Portal-to-Portal Act surely did not curb FLSA litigation, despite being intended to "limit" employer liability. Not only has the number of FLSA lawsuits filed each year increased by 514 percent since 1991, but FLSA lawsuits also constitute a larger portion of all federal lawsuits than in past years. For example, in 1991 FLSA lawsuits made up 0.6 percent of all civil lawsuits. But, by 2012, "FLSA lawsuits accounted for almost 3 percent of all civil lawsuits, an increase of 383 percent."[7] Between 2010 and 2012 alone, FLSA claims filed in federal court increased by almost 1,000.[8] And a record 8,148 FLSA lawsuits were filed in federal district courts in 2012.[9] If the Court does not reaffirm the bipartite "integral and indispensable" test, a deluge of additional FLSA litigation is sure to come. The flood will sink some employers.

III. STATE AND LOCAL GOVERNMENT WILL FACE PARTICULAR HARM UNLESS THE BIPARTITE TEST IS REAFFIRMED.

The Ninth Circuit's decision exposes countless employers to unexpected FLSA liability. But one type of employer is particularly vulnerable to new FLSA liabilities under the

---

7 UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, FAIR LABOR STANDARDS ACT: THE DEPARTMENT OF LABOR SHOULD ADOPT A MORE SYSTEMATIC APPROACH TO DEVELOPING ITS GUIDELINES 6 (2013), *available at* http://www.gao.gov/assets/660/659772.pdf.

8 *FLSA Cases in Federal Court*, SEYFARTH SHAW LLP (2012), http://op.bna.com/dlrcases.nsf/id/kmgn-8wkkf7/$File/FLSAchart.pdf.

9 UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 7, at 6.

collapsed construction of the "integral and indispensable" test: state and local governments.

As of March 2011, state and local governments employed roughly 19.3 million people.[10] By comparison, in 2013, the nation's largest private employer employed 2.2 million people globally, and only 1.3 million people in the United States.[11] As the nation's largest employer, state and local governments have a significant interest in the outcome of any case that has the potential to greatly expand employer liability. And they have a particularly acute interest in this case because many states,[12] cities,[13] and counties[14] maintain

---

10 DEIRDRE BAKER, ANNUAL SURVEY OF PUBLIC EMPLOYMENT & PAYROLL SUMMARY REPORT: 2011 2–3 (Aug. 22, 2013), *available at* http://www2.census.gov/govs/apes/2011_summary_report.pdf.

11 Alexander E.M. Hess, *The 10 Largest Employers in America*, USA TODAY (Aug. 22, 2013, 7:48 AM), http://www.usatoday.com/story/money/business/2013/08/22/ten-largest-employers/2680249.

12 *See, e.g.*, NAT'L ASS'N OF ST. PROCUREMENT OFFICIALS, http://www.naspo.org (last visited May 31, 2014); TENN. DEP'T OF GEN. SERVS., CENT. PROCUREMENT OFF., http://tn.gov/generalserv/cpo (last visited May 31, 2014); OKLA. CENT. PURCHASING DIV., http://www.ok.gov/DCS/Central_Purchasing (last visited May 31, 2014).

13 *See, e.g.*, CITY OF GARLAND, PURCHASING, http://www.ci.garland.tx.us/gov/lq/purchasing/default.asp (last visited May 31, 2014); CITY OF SCOTTSDALE, PURCHASING, http://www.scottsdaleaz.gov/departments/adminservices/purchasing (last visited May 31, 2014); CITY OF SAVANNAH, PURCHASING, http://savannahga.gov/index.aspx?nid=491 (last visited May 31, 2014).

14 *See, e.g.*, MADISON CNTY., ALA., PURCHASING DEP'T., http://madisoncountyal.gov/about/org/CoDepts/Purchasing.shtml (last visited May 31, 2014); SALT LAKE CNTY., CONTRACTS AND PROCUREMENT, http://admin.slco.org/contracts/puSurplusWarehouseInfo.aspx (last visited May 31, 2014); TARRANT CNTY., PURCHASING DEP'T, https://www.tarrantcounty.com/ePurchasing/site/default.asp (last visited May 31, 2014).

procurement offices and operate warehouses. Like the Petitioner in this case, these entities have a strong interest in using security screening at the end of the workday to prevent and detect theft. Many state and local government buildings—such as capitols, courthouses, office buildings, and correctional facilities—require employees to pass through security screening on a daily basis.[15]

Florida, for example, demands that "[a]ll employees and contract staff [of the Department of Corrections] shall be subject to some form of metal detection system search, and items in their possession or on their person shall be inspected prior to gaining entry to an institution or facility of the Department [of Corrections]." Fla. Admin. Code R. 33-208.002.

Similarly, Tennessee requires that "[p]eriodic routine searches for contraband shall be made of all employees of the department [of corrections] prior to the entrance of the persons inside the confines of a state correctional facility." Tenn. Code Ann. § 41-1-102.

These examples are just the tip of the iceberg. The Ninth Circuit's liberal interpretation of "integral and indispensable" has extraordinary implications for other state and local government employees whose commute to and from work might be interrupted, prolonged, or delayed by any activity that "benefits" the employer.

---

15 *See e.g.*, Merced Cnty. Super. Ct. R. 418(A) ("All persons entering the courthouse or courtroom shall be subject to cursory search ."); Washington Courthouse Mun. Ct. Local R. 54.1 ("All persons entering the court facility are subject to search.").

State and local governments currently spend approximately $70.5 billion each month on payroll.[16] If the Ninth Circuit's opinion increases payroll expenses by only 0.25%, it will increase state and local governments' payroll expenses by an additional $176,250,000 each month, or over $2.1 billion each year.[17] This does not account for expenses associated with litigating these cases, the cost of ensuring FLSA compliance, or the fact that any additional compensation would most likely be calculated at overtime rates. Now is certainly not the time to create unanticipated and unbudgeted liabilities for state and local governments. Many remain in dire financial straits, with full recovery from the Great Recession not yet in sight.

In June of 2012, thirty-one states had projected budget gaps totaling $55 billion for fiscal year 2013,[18] and four of

---

16 BAKER, *supra* note 10, at 2–3.

17 The Ninth Circuit's opinion would increase payroll by 0.25% if state and local governments were required to compensate employees amounting to 10% of payroll expenses for one additional hour per week based on a 40 hour work week: (1 ÷ 40) × 0.1 = 0.0025 or 0.25%. Respondents' attorney estimates that nationally hundreds of thousands of people employed as warehouse workers spend 20 to 30 minutes every day clearing employer mandated security screening. *9th Circuit Court of Appeals Says Amazon's Warehouse Workers Must Be Paid for Security Check Point Time*, BUSINESS WIRE, (Apr. 12, 2013 6:57 PM), http://www.businesswire.com/news/home/20130412005934/en/9th-Circuit-Court-Appeals-Amazon%E2%80%99s-Warehouse-Workers. This amounts to approximately two additional compensable hours for every five days worked. Therefore, even if security screening conducted by state and local governments is twice as fast as the security screening at issue in this case, it would still lead to one additional hour of compensable time for every five days worked by affected employees.

18 Phil Oliff, Chris Mai & Vincent Palacios, *States Continue to Feel Recession's Impact*, CENTER ON BUDGET AND POLICY PRIORITIES 2 (Jun. 27, 2012), *available at* http://www.cbpp.org/cms/index.cfm?fa=view&id=711.

the five largest municipal bankruptcies in history were filed in the past three years, with Detroit, Michigan ($18 billion) filing in 2013, Stockton, California ($1 billion) and San Bernardino County, California ($500 million) filing in 2012, and Jefferson County, Alabama ($4 billion) filing in 2011.[19] As of April 2013, municipal bond credit rating downgrades outnumbered credit rating upgrades for sixteen consecutive quarters, the longest period this has occurred since Moody's Investor Services began collecting data.[20] And in early 2014, the State Budget Crisis Task Force concluded that "[t]he ability of state and local governments to meet their obligations to public employees, to creditors, and, most critically, to the education and well-being of the public is deteriorating," and noted that "[t]he fiscal course of many states and their local governments remains unsustainable."[21]

Congress has long recognized that the goals of the FLSA must be balanced against "the particular needs and circumstances of the states and their political subdivisions." S. Rep. No. 99-159, at 7 (1985). It abided this directive by passing the Fair Labor Standards Amendments of 1985, which delayed the FLSA's application to state and local governments,

---

19 *Biggest Municipal Bankruptcies in U.S. History*, FORBES, http://www.forbes.com/pictures/ejii45efkm/the-5-biggest-municipal-bankruptcies-in-u-s-history/ (last visited Oct. 30, 2013).

20 Jake Zamansky, *Investors Face Potential Municipal Bond Armageddon*, FORBES (Apr. 25, 2013, 11:03 AM), http://www.forbes.com/sites/jakezamansky/2013/04/25/investors-face-potential-municipal-bond-armageddon.

21 STATE BUDGET CRISIS TASK FORCE, FINAL REPORT, 8 (2014); *see also* UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, STATE AND LOCAL GOVERNMENTS' FISCAL OUTLOOK APRIL 2013 UPDATE 1 (2013), *available at* http://www.gao.gov/assets/660/654255.pdf. (noting that "the state and local sector faces a gap between revenue and spending and long-term fiscal challenges that grow over time.").

Pub L. No. 99–150, 99 Stat. 787 (1985), by creating different maximum hour rules for public fire protection or law enforcement employees, 29 U.S.C. § 207(k), and by allowing public employers to provide compensatory time off in lieu of overtime compensation. 29 U.S.C. § 207(o). Such action was necessary because "local governments are in many cases not in a position to 'pass along' additional financial requirements to the taxpayer." 131 Cong. Rec. 4191-01 (1985) (statement of Rep. John P. Hammerschmidt conveying local government officials' concern regarding the impact of *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985)).

The Ninth Circuit's decision will pile additional liabilities on state and local governments that are still struggling to overcome the effects of the Great Recession. These unbudgeted liabilities will push our nation's state and local governments even closer to insolvency. It is therefore imperative that this Court correct the Ninth Circuit's expansive interpretation of "integral and indispensable" activities and rein in the reach of compensable preliminary and postliminary activities.

***

Security screenings have become unavoidable in this country after 9/11. They are practically mandatory before entry into, and frequently egress from, sensitive buildings like state capitols, government offices, courthouses, and correctional facilities. Public-sector employees who work in these buildings pass through security screenings each and every day. Collapsing the "integral" and "indispensable" analyses to make these screenings compensable under the Portal-to-Portal Act would open the floodgates of FLSA litigation and wreak havoc on employers throughout the country. The unanticipated surge in cognizable claims will have an immediate and devastating impact on employers, particu-

larly state and local governments still struggling to fully recover from the Great Recession.

CONCLUSION

For all of these reasons, the Court should reverse the judgment below.

Respectfully submitted.

LISA SORONEN
Executive Director
STATE & LOCAL
LEGAL CENTER
444 North Capitol Street NW
Suite 515
Washington, D.C. 20001
(202) 434-4845
lsoronen@sso.org

JAMES C. HO
Counsel of Record
ASHLEY E. JOHNSON
ANDREW P. LEGRAND
GIBSON, DUNN &
CRUTCHER LLP
2100 McKinney Avenue
Dallas, TX 75201
(214) 698-3100
jho@gibsondunn.com

Counsel for Amici Curiae

June 4, 2014

AMICUS CURIAE BRIEF

No. 13-433

Supreme Court U.S.
FILED
JUN 04 2014
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC.,

Petitioner,

v.

JESSE BUSK AND LAURIE CASTRO, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NATIONAL RETAIL FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MAX G. BRITTAIN, JR.
Counsel of Record
PATRICIA COSTELLO SLOVAK
LAUREN S. NOVAK
SCHIFF HARDIN LLP
233 S. Wacker Drive, Suite 6600
Chicago, Illinois 60606
(312) 258-5500
mbrittain@schiffhardin.com

Attorneys for Amicus Curiae National Retail Federation

Dated: June 4, 2014

253768

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT.. 5

I. Security Screenings Are Postliminary Activities That Are Not Compensable Under the Portal-to-Portal Act. 5

A. The Portal-to-Portal Act Limits the Activities For Which Employers Must Compensate Employees. 6

B. Security Screenings Are Not Integral and Indispensable to the Principal Activities Integrity's Employees Are Employed to Perform... 7

C. Other Circuits Have Correctly Held That Security Screenings Are Not Compensable Under the Portal-to-Portal Act. .. .. .10

II. If Affirmed, the Ninth Circuit's Holding Will Harm Retailers That Use Employee Bag Searches for Loss Prevention... 12

Table of Contents

Page

A. Affirmance of the Ninth Circuit's Decision Would Have Important Financial and Practical Implications for Retailers.. 13

B. Affirmance of the Ninth Circuit's Decision Would Also Affect Retailers That Use Other Security Methods to Reduce Profit Shrinkage.. 16

C. Affirmance of the Ninth Circuit's Decision Will Cause a Flood of Litigation That Will Harm Retailers.. 16

CONCLUSION 18

TABLE OF CITED AUTHORITIES

Page

CASES

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 680 (1946). 6, 17

Bonilla v. Baker Concrete Construction, Inc.,
487 F.3d 1340 (11th Cir. 2007). 11

Busk v. Integrity Staffing Solutions, Inc.,
713 F.3d 525 (9th Cir. 2013). 4, 8

Gorman v. Consolidated Edison Corp.,
488 F.3d 586 (2d Cir. 2007) 10, 11

IBP, Inc. v. Alvarez,
546 U.S. 21 (2005). 3, 8, 9

Mitchell v. King Packing Co.,
350 U.S. 260 (1956). 8

Sandifer v. U.S. Steel Corp.,
134 S. Ct. 870 (2014). 6

Steiner v. Mitchell,
350 U.S. 247 (1956). 3, 9, 11, 12

Cited Authorities

Page

STATUTES AND OTHER AUTHORITIES

29 U.S.C. § 251(a) 6, 17

29 U.S.C. § 254(a) 3, 7

29 U.S.C. § 254(b) 7

29 C.F.R. § 790.7(b) 3, 7

29 C.F.R. § 790.7(g) 3, 4, 7

29 C.F.R. § 790.8(a) 3, 7

29 C.F.R. § 790.8(b) 3

Cherryh A. Butler, *NRF 12 – 3 Shopping Behaviors That Should Determine Product Placement*, Retailcustomerexpierence.com (Jan. 19, 2012) . . 14

Richard C. Hollinger & Amanda Adams, *2012 National Retail Security Survey Final Report* (2014) 1

Sarah Nassauer, *A Food Fight in the Produce Aisle*, Wall Street Journal (Oct. 20, 2011) 14

INTEREST OF AMICUS CURIAE[1]

The National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing $2.5 trillion to annual GDP, retail is a daily barometer for the nation's economy. As the industry umbrella group, the NRF periodically submits amicus curiae briefs in cases raising significant legal issues, including employment law issues, which are important to the retail industry.

Retailers are especially vulnerable to employee theft. It is the leading cause of profit shrinkage in the industry.[2] In 2012, employee theft cost retailers approximately $18.1 billion, with the average dollar loss per incident totaling $1,703.17.[3] The retail industry faces a unique challenge in managing employee theft because retail employees often have access to large inventories of merchandise that may be small in size, high in value, and easily resold. The retail industry must therefore use a variety of security

---

1. Both parties filed notices with the Court consenting to the filing of amicus briefs. No counsel for a party authored this brief in whole or in part. No counsel or party, other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this amicus brief.

2. *See* Richard C. Hollinger & Amanda Adams, *2012 National Retail Security Survey Final Report* (2014).

3. *Id.*

screening methods to prevent substantial losses. This includes employee bag searches.

Affirmance of the Ninth Circuit's decision would significantly harm retailers that use employee bag searches — 63% of retailers in 2012[4] — and other employee security screenings, as loss prevention measures similar in purpose to the security screenings at issue here. Affirmance would not only generate potential legal liability for retailers, but would impose substantial costs on retailers that must reconfigure their security screening and time clock procedures in order to continue using employee bag searches. This Court's decision is therefore critically important to retailers.

SUMMARY OF ARGUMENT

The Ninth Circuit held that Integrity Staffing Solutions, Inc. must compensate employees for time spent in security screenings conducted after their work shift. The NRF urges this Court to reverse the Ninth Circuit's decision and hold that the security screenings required by Integrity are not compensable, based on the Portal-to-Portal Act's exceptions for postliminary activities. This Court's precedent, the plain language of the Portal-to-Portal Act, and rulings of the Second and Eleventh Circuits demonstrate that the security screenings are not integral and indispensable to the principal activity of Integrity's employees — filling purchase orders for customers of Amazon.com.

---

4. *Id.*

The security screenings are non-compensable because they are postliminary to the principal activities of Integrity's employees. The Portal-to-Portal Act, which amended the Fair Labor Standards Act, exempts from compensation several activities, including the following:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities.

29 U.S.C. § 254(a). Although the Portal-to-Portal Act does not define "principal activity" or "preliminary" and "postliminary" activities, the Department of Labor's regulations provide examples for courts interpreting the Act. "Principal activities" are "activities which the employee is 'employed to perform." 29 C.F.R. § 790.8(a). They "include all activities which are an integral part of a principal activity." 29 C.F.R. § 790.8(b). "Preliminary" and "postliminary" activities include "checking in and out and waiting in line to do so" and "waiting in line to receive pay checks." 29 C.F.R. § 790.7(g).

This Court has held that an activity is not preliminary or postliminary to the employee's principal activity if it is "integral and indispensable" to the employee's principal activity. *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956). "The fact that certain . . . activities are necessary for employees to engage in their principal activities does not mean that those activities are 'integral and indispensable' to a 'principal activity' under *Steiner*." *IBP, Inc. v. Alvarez*, 546 U.S. 21, 40-41 (2005).

The Ninth Circuit applied an incorrect standard when it held that Integrity's security screenings are compensable under the FLSA because they are required by Integrity and conducted for Integrity's benefit to prevent theft. *Busk v. Integrity Staffing Solutions, Inc.*, 713 F.3d 525, 531 (9th Cir. 2013). Merely because the screenings are required by Integrity to prevent employee theft does not mean that the screenings are integral and indispensable to the principal activity of Integrity's employees. Rather, the security screenings parallel the examples of preliminary and postliminary activities included in the Department of Labor's regulations, such as waiting in line to punch a time clock or receive a paycheck. *See* 29 C.F.R. § 790.7(g). Because the screenings are further iterations of these activities, they are therefore not compensable.

Many retail employers use employee security screenings, including employee bag searches, as a loss prevention method. Bag searches and the security screenings at issue in this case share a similar purpose. Both are required by the employer and conducted to prevent employee theft and reduce profit shrinkage. Just as the security screenings at issue here are not integral and indispensable to the work performed by Integrity's employees, bag searches are not integral and indispensable to retail employees' principal activities — customer service.

The NRF urges this Court to consider the financial and practical effect of its decision on retail industry employers that require employee bag searches. Affirmance of the Ninth Circuit's decision would force retailers to undertake costly and impractical reconfigurations of store security measures. To compensate employees for security-check

time, retailers would need to relocate time clocks to an area near or even outside the stores' exit, or (if relocation is impossible) hire additional personnel to escort employees through the store following security searches at time clocks remote from the exit.

ARGUMENT

I. Security Screenings Are Postliminary Activities That Are Not Compensable Under the Portal-to-Portal Act.

The Ninth Circuit misapplied the Portal-to-Portal Act and this Court's precedent when it held that security screenings of employees are compensable under the FLSA. Activities merely preliminary or postliminary to the principal activities the employee is employed to perform are expressly exempt from compensation under the Portal-to-Portal Act. Interpreting the Portal-to-Portal Act's exceptions, this Court has held that activities are compensable only if they are "integral and indispensable" to the employee's principal activities. Here, Integrity's employees filled purchase orders for Amazon.com customers. In retail generally, employees are engaged in a range of tasks related directly or indirectly to customer service. The post-work security screenings are not integral and indispensable to the principal activities for which the employees are employed, making the screenings non-compensable postliminary activities under the Portal-to-Portal Act.

A. The Portal-to-Portal Act Limits the Activities For Which Employers Must Compensate Employees.

Congress passed the Portal-to-Portal Act in response to this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946), which held that the FLSA's "statutory workweek includes all time during which an employee is necessarily required to be on the employer's premises on duty or at a prescribed workplace." This statutory interpretation was more expansive than the "long-established customs, practices, and contracts between employers and employees." 29 U.S.C. § 251(a). It placed significant burdens on employers, including an obligation to compensate employees for activities that were previously non-compensable, such as punching in, walking on the employer's premises, and performing duties before the employees' principal work commenced. *Id.*

As this Court recently noted, "[o]rganized labor seized on [*Anderson*'s] expansive construction of compensability by filing what became known as 'portal' actions," collectively seeking damages in excess of a billion dollars. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 875 (2014). In response, Congress amended the FLSA by passing the Portal-to-Portal Act to remedy the "substantial burden" on employers and the "substantial obstruction to the free flow of goods in commerce" that the *Anderson* decision generated. 29 U.S.C. § 251(a). It specifically excluded from compensation several activities, including the following:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is

> employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities which occur prior to the time on any particular workday at which the employee commences or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a). Employers may enter agreements to compensate employees for these activities, but are not required to do so. *Id.* at § 254(b).

Department of Labor regulations define the terms "principal activity" and "preliminary or postliminary activity" as they are used in the Act. "Principal activities" are those that the employee is employed to perform. 29 C.F.R. § 790.8(a). A "preliminary activity" is an activity "engaged in by an employee before the commencement of his or her 'principal' activity or activities," and a "postliminary activity" is an activity "engaged in by an employee after the completion of his 'principal' activity or activities." 29 C.F.R. § 790.7(b). The regulations further specify that activities including "checking in and out and waiting in line to do so" and "waiting in line to receive pay checks" are considered preliminary or postliminary activities. *Id.* 29 C.F.R. § 709.7(g)

B. Security Screenings Are Not Integral and Indispensable to the Principal Activities Integrity's Employees Are Employed to Perform.

This Court's decisions interpreting the Portal-to-Portal Act, while not directly addressing whether security

screenings are compensable, indicate that the security screenings required by Integrity should be subject to the Act's specific exceptions. Integrity's employees worked in a warehouse filling purchase orders for Amazon.com customers. After clocking out they passed through a security screening before leaving the warehouse. The Ninth Circuit held that Integrity's employees are entitled to compensation for the security-screening time under the FLSA. *Busk*, 713 F.3d at 531. It reasoned that because the screenings are required by Integrity and "intended to prevent employee theft," they are "necessary to employees' principal work as warehouse employees and done for Integrity's benefit." *Id.* The Ninth Circuit's holding is contrary to the intent of the Portal-to-Portal Act and this Court's precedent.

An activity is compensable only when it is an "an integral and indispensable part of the principal activities for which the covered workmen are employed." *Steiner*, 350 U.S. at 256. Thus, battery plant workers exposed to toxic chemicals are entitled to compensation for time spent donning and doffing the protective gear that is "indispensable to the performance of their productive work and integrally related thereto." *Id.* at 251-52. Similarly, knife sharpening is integral and indispensable to the task of butchering meat. *Mitchell v. King Packing Co.*, 350 U.S. 260, 263 (1956).

In *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), this Court gave additional guidance on what constitutes an integral and indispensable part of an employee's principal activity. The Court held that the time spent *waiting* to don and doff protective was not compensable under the FLSA, even though the donning and doffing itself was integral

and indispensable to the employees' principal activity. *Id.* at 40-41. The Court compared the time spent waiting to don and doff equipment to other non-compensable activities, such as waiting to check in or waiting to receive a paycheck, and concluded that "the fact that certain preshift activities are necessary for employees to engage in their principal activities does not mean that those preshift activities are 'integral and indispensable' to a principal activity under *Steiner*." *Id.*

The Ninth Circuit failed to engage in the proper analysis required by *Steiner* and *Alvarez* when it held that employee screenings are compensable because they are "necessary to the employees' principal work" and performed for "Integrity's benefit." *Busk* 713 F.3d at 531. The court should have examined whether the screenings are integral and indispensable to the specific tasks that Integrity's employees are employed to perform. Although the security screenings are required by Integrity to prevent theft, theft prevention is not related to the employees' principal activity. The employees' principal activity is taking merchandise from a shelf and placing it into a shipping package. Passing through a security screening is not integral and indispensable to that activity.

Integrity's security screenings more closely resemble the examples of excluded activities described in the Department of Labor's regulations interpreting the Portal-to-Portal Act, or the activities held to be excluded in *Alvarez* (waiting to don and doff equipment). The regulations specifically exempt from compensation such activities as waiting in line to punch a time clock and waiting in line for a paycheck. For Integrity's employees, waiting in line to punch a time clock is functionally like

going through a security screening at the end of the workday. Both activities require the employees to wait in a line. At the end of the time clock line, employees must punch their time cards so their employer can confirm and accurately record their working hours. At the end of the security line, employees must go through a screening so their employer can confirm they are not unlawfully removing property from the premises. Each of these tasks may be necessary for purposes of payroll or exiting the facility, but neither is integral or indispensable to the employees' principal activity of filling purchase orders for Amazon.com customers. Because the purpose and necessity of these two activities are comparable, the security screenings are properly analyzed as non-compensable under the Portal-to-Portal Act's exception for postliminary activities.

C. Other Circuits Have Correctly Held That Security Screenings Are Not Compensable Under the Portal-to-Portal Act.

The Ninth Circuit declined to follow the decisions of the Second and Eleventh Circuits, both of which concluded that security screenings are not compensable under the Portal-to-Portal Act because they are not integral and indispensable to the principal activities that the employees are employed to perform.

In *Gorman v. Consolidated Edison Corp.*, 488 F.3d 586, 588 (2d Cir. 2007), the Second Circuit concluded that employees at the Indian Point nuclear power plant were not entitled to compensation for their time spent waiting in line to pass through a security checkpoint at the beginning and end of each day. The court held that, although the

screenings were "necessary in the sense that they are required and serve essential purposes of security," they were not "integral to the principal work activities." *Id.* at 593. The court correctly analyzed the security screenings as merely "modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act," such as walking, riding, and traveling to the place where the principal activities are performed. *Id.*

Similarly, in *Bonilla v. Baker Concrete Construction, Inc.*, 487 F.3d 1340 (11th Cir. 2007), the Eleventh Circuit held that construction workers were not entitled to compensation for time spent passing through a security checkpoint at an airport where they performed their duties. The court rejected the employees' contention that the time was compensable because passing through the screening was necessary to perform their jobs. *Id.* at 1344. Because the "integral and indispensable" test is not a "but-for test of causal necessity," the mere requirement that the employees pass through the security checkpoint did not establish that the screening was integral and indispensable to the principal activity they were employed to perform. *Id.*

The C- -rts of Appeals in *Bonilla* and *Gorman* correctl, h -1 that security screenings failed to meet the "integral and indispensable" standard set forth in *Steiner*. The NRF urges this Court to reach the same conclusion here and hold that the time spent by Integrity's employees waiting to exit the workplace through security is non-compensable under the Portal-to-Portal Act.

II. If Affirmed, the Ninth Circuit's Holding Will Harm Retailers That Use Employee Bag Searches for Loss Prevention.

The Ninth Circuit's holding imposes significant practical and financial burdens on employers, which are best demonstrated through its impact on retail employers. If affirmed, the Ninth Circuit's decision will harm retailers generally, because the security screenings at issue here are similar in purpose to the mandatory bag searches that retailers frequently use.

In the retail setting, a typical employee assists customers, stocks shelves, and operates the cash register. These are the principal activities for which the retail employee is employed. After completing their principal activities, employees clock out, proceed to the employee locker room to obtain their personal items, and then continue on through the store to the exit. Only then is a bag search performed to deter or prevent employee theft. Conducting the search at the exit strongly deters employee theft because employees are less likely to steal items if they know they will be searched just before leaving.

Like the security screenings at issue in this appeal, such bag searches are not "integral and indispensable" to the employees' principal work activities, under the standard established in *Steiner*. The bag search is required by the employer to prevent employee theft, but the retail employees described above need not undergo a bag search to perform their customer service responsibilities. This is exactly the type of activity that Congress exempted from compensation in the Portal-to-Portal Act.

A. Affirmance of the Ninth Circuit's Decision Would Have Important Financial and Practical Implications for Retailers.

If this Court adopts the reasoning of the Ninth Circuit and holds that Integrity's security screenings are compensable (rather than exempt under the Portal-to-Portal Act) retailers will be unable to use bag searches unless they expend considerable funds to reconfigure their current search methods. Large retailers may be more readily able to absorb such costs, but smaller retailers likely will not.

Under the Ninth Circuit's reasoning, employers must compensate employees for their time spent undergoing security checks. To properly record that time, retail employers would have to perform their security checks before the employee clocks out, and compliance would require the typical retailer to relocate its time clock. Some retailers place the time clock at the back of the store, near the employee locker room, where personal belongings are stored. Other retailers require employees to clock in and out using a timekeeping program on a cash register. After employees clock out and collect their belongings, they often proceed through the store to the main exit where the bag searches are performed by security personnel.

Time clocks, however, are no longer a machine on a wall or desk where employees stamp a physical card. The modern-day time clock is a computer, cash register or swipe machine that takes up considerable space. If obligated to compensate employees for all time spent going through the bag searches, retailers will have to relocate the time clocks to the exit of the store where the

bag searches take place. That would be both expensive and impractical. Apart from the cost of relocating the machinery, retailers will be impacted in additional ways. For example, placing the time clock at the store's exit may create congestion in an otherwise public area, particularly if multiple employees simultaneously end their shift while customers are still present. Relocating the time clock may also distract security personnel performing bag searches in the same area. Finally, where the time clock is a cash register, relocating the register near the door will impede sales by reducing valuable square footage in an area where product placement can be critical to successfully drawing customers into the store and increasing sales.[5]

Some retailers may be unable to relocate the time clock to a location at or near the exit of the store. For small retailers there may not be enough space. For others, placing the time clock at the exit may recreate opportunities for employee theft. Especially in small retail stores, merchandise may be located within a few feet of the door. If employees undergo bag searches and then clock out near the exit, they may have access to this merchandise in between these two activities. Relocating the time clock to this area defeats the purpose of the bag searches if it gives employees an opportunity to steal merchandise before leaving the store. In both instances,

---

5. *See* Sarah Nassauer, *A Food Fight in the Produce Aisle*, Wall Street Journal (Oct. 20, 2011), *available at* http://online.wsj.com/news/articles/SB10001424052970203752604576640923370662418; *see also* Cherryh A. Butler, *NRF 12 – 3 Shopping Behaviors That Should Determine Product Placement*, Retailcustomerexpierence.com (Jan. 19, 2012), *available at* http://www.retailcustomerexperience.com/articles/nrf12-five-traits-retailers-must-possess-to-be-future-proof/

the only option may be to place the time clock outside the store — raising further issues of space (there may be none for retailers located in shopping malls), exposure to the elements, or vandalism.

If relocation of the time clock is infeasible, retailers may need to require security personnel or supervisors to serve as the time clock by manually recording the time that each employee leaves the store after the conclusion of the bag search. Manual recordation of time would be less efficient than time clocks, and subject to human error or improper alteration. Additionally, it distracts supervisors and security personnel from their regular duties — supervising employees or monitoring customers' conduct to ensure against theft of merchandise.

As a final option, retailers might need to reposition security personnel to conduct bag searches near the current location of the time clock, rather than at the exit of the store. For two reasons, however, that option would require retailers to hire additional security personnel. First, since retail employers' security personnel typically perform dual functions — checking employee bags and monitoring against customer theft — additional staff would be needed to provide the store sufficient security. Second, the employer would need personnel to escort employees as they make their way through the store from the time clock/bag search area to the exit to ensure against theft between the bag search and the employees' exit from the store. Small retailers may not be able to bear the cost of additional security personnel, and for all retailers adding more staff is impracticable.

B. Affirmance of the Ninth Circuit's Decision Would Also Affect Retailers That Use Other Security Methods to Reduce Profit Shrinkage.

Some retailers use other security measures besides bag checks to deter theft and reduce profit losses. Affirmance of the Ninth Circuit's decision would also affect these measures. For example, some retailers require employees to park their vehicles in the parking spaces farthest away from the store. They typically do so to ensure that customers have access to prime parking spaces, but some employers also require it as a loss prevention method — to deter employees from accessing their vehicles during breaks to store stolen merchandise. The Ninth Circuit's reasoning — that measures are compensable if they are required by the employer and are conducted for its benefit to prevent theft — might apply to an employer's parking restrictions if implemented for loss prevention purposes. But merely because an employer requires this as a loss prevention method does not make the time spent by employees in using the furthest parking spots compensable. The Portal-to-Portal Act itself rejects this outcome, by classifying time spent walking to and from the employer's premises as non-compensable.

C. Affirmance of the Ninth Circuit's Decision Will Cause a Flood of Litigation That Will Harm Retailers.

Finally, holding that employers must compensate employees for security screenings will likely result in a flood of litigation against the retailers that conduct bag searches. Retailers have consistently interpreted the Portal-to-Portal Act's exception for postliminary activities

as excluding bag searches from the realm of compensable activities. If the Ninth Circuit's decision is affirmed, the retail industry will be particularly susceptible to class action litigation filed on behalf of current and former employees seeking unpaid wages, overtime and liquidated damages for their time spent going through a bag search. With 63% of retailers using this particular loss prevention method, the liability could be substantial for a practice long considered in compliance with the Act. And the threat is a tangible one. As stated by Petitioners, numerous class action lawsuits have already been filed against retailers since the Ninth Circuit's decision was issued. *See* Brief of Petitioner at 47. That number will no doubt increase if the decision is affirmed. This defeats the purpose of the Portal-to-Portal Act, which sought to curb the flood of litigation that the *Anderson* decision generated. 29 U.S.C. § 251(a). Any change to the Portal-to-Portal Act, as interpreted, should be legislative and prospective.

CONCLUSION

The security screenings at issue are not integral and indispensable to the principal activities of Integrity's employees — filling purchase orders for Amazon.com customers. The security screenings (like the bag check and other loss-prevention measures used by retailers) are merely postliminary activities, which are not compensable under the Portal-to-Portal Act. Affirmance of the Ninth Circuit decision would subject retailers to unwarranted potential backpay liability, and impose on them costly and impractical obligations to reconfigure their time clock procedures. The NRF respectfully urges the Court to reverse the Ninth Circuit's decision and issue a ruling in favor of Integrity Staffing Solutions, Inc.

Respectfully submitted,

MAX G. BRITTAIN, JR.
Counsel of Record
PATRICIA COSTELLO SLOVAK
LAUREN S. NOVAK
SCHIFF HARDIN LLP
233 S. Wacker Drive, Suite 6600
Chicago, Illinois 60606
(312) 258-5500
mbrittain@schiffhardin.com

Attorneys for Amicus Curiae
National Retail Federation

AMICUS CURIAE BRIEF

No. 13-433

Supreme Court, U.S.
FILED
JUN 04 2014
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

INTEGRITY STAFFING SOLUTIONS, INC.,

Petitioner,

v.

JESSE BUSK AND LAURIE CASTRO, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE RETAIL LITIGATION CENTER, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, SOCIETY FOR HUMAN RESOURCE MANAGEMENT, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

DANIEL J. DAVIS
PROSKAUER ROSE LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004
(202) 416-6800

EDWARD A. BRILL
Counsel of Record
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
(212) 969-3000
ebrill@proskauer.com

Counsel for Amici Curiae

(Additional Counsel Listed on Inside Cover)

253760

DEBORAH R. WHITE
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Arlington, VA 22209
(703) 600-2067

Counsel for Amicus Curiae
Retail Litigation Center, Inc.

NANCY B. HAMMER
SOCIETY FOR HUMAN
RESOURCE MANAGEMENT
1800 Duke Street
Alexandria, VA 22314
(703) 535-6030

Counsel for Amicus Curiae
Society for Human Resource
Management

KAREN R. HARNED
ELIZABETH MILITO
NATIONAL FEDERATION OF
INDEPENDENT BUSINESS SMALL
BUSINESS LEGAL CENTER
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 406-4443

Counsel for Amicus Curiae
National Federation of
Independent Business
Small Business Legal Center

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae
Chamber of Commerce of the
United States of America

LINDA E. KELLY
QUENTIN RIEGEL
PATRICK N. FORREST
NATIONAL ASSOCIATION
OF MANUFACTURERS
733 10th Street, NW
Washington, DC 20001
(202) 637-3000

Counsel for Amicus Curiae
National Association of
Manufacturers

TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT.... 6

I. THE NINTH CIRCUIT'S DECISION MISAPPLIES THE PORTAL-TO-PORTAL ACT AND THIS COURT'S DECISIONS INTERPRETING THE ACT. 6

II. ADOPTION OF THE NINTH CIRCUIT'S NEW RULE WOULD DISRUPT ESTABLISHED WORKPLACE PRACTICES BY IMPOSING AN UNWIELDY TEST THAT HAS ALREADY INCREASED LITIGATION .12

A. The Ninth Circuit's Rule Would Be Difficult To Apply And Lead To Uncertainty For Employers. .. .12

B. The Ninth Circuit's Rule Would Lead To Increased Litigation And Undue Pressures On Employers To Settle ...16

Table of Contents

Page

C. Employers Could Be Deprived Of An Important Tool Used To Mitigate The Serious Problem Of Employee Theft ...18

CONCLUSION 21

TABLE OF CITED AUTHORITIES

Page

CASES

Allison v. Amazon.com,
No. 2:13-cv-1612 (W.D. Wash. Sept. 6, 2013) . . 17-18

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 680 (1946) 7

Anderson v. Purdue Farms, Inc.,
604 F. Supp. 2d 1339 (M.D. Ala. 2009) 9

Barba v. Trinity Servs. Group., Inc.,
No. 4:13-cv-1280 (D. Ariz. Feb. 19, 2014) 17

Bonilla v. Baker Concrete Constr., Inc.,
487 F.3d 1340 (11th Cir. 2007) 9, 11

Ceja-Corona v. CVS Pharmacy,
No. 12-1868, 2013 WL 796649 (E.D. Cal.
Mar. 4, 2013) 17

Ceja-Corona v. CVS Pharmacy,
No. 12-1868, 2013 WL 3282974 (E.D. Cal.
July 2, 2013). 17

Christopher v. SmithKline Beecham Corp.,
132 S. Ct. 2156 (2012) 12

Cortez v. Ross Dress for Less, Inc.,
No. 5:13-cv-1298 (C.D. Cal. July 24, 2013). . . 18

Cited Authorities

Page

Frlekin v. Apple Inc.,
No. 3:13-cv-3451 (N.D. Cal. July 25, 2013) 18

Gorman v. Consol. Edison,
488 F.3d 586 (2d Cir. 2007) 9, 11

IBP, Inc. v. Alvarez,
546 U.S. 21 (2005). .. .. *passim*

Imada v. City of Hercules,
138 F.3d 1294 (9th Cir. 1998) .... .15

Johnson v. Amazon.com,
No. 1:13-cv-153 (W.D. Ky. Sept. 17, 2013). . ... .17

Kalin v. Apple, Inc.,
No. 3:13-cv-4727 (N.D. Cal. Oct. 10, 2013). .. .17

Kavanagh v. Grand Union Co., Inc.,
192 F.3d 269 (2d Cir. 1999) 15

Le v. CVS Caremark Corp.,
No. 1:13-cv-6438 (E.D.N.Y. Feb. 5, 2014). 17

Roberts v. TJX Cos.,
No. 3:13-cv-4731 (N.D. Cal. Oct. 10, 2013)... 17

Ruiz v. JCP Logistics, Inc.,
8:13-cv-01908-JLS-AN (C.D. Cal., Dec. 5, 2013) .17

Cited Authorities

Page

Sleiman v. DHL Express,
No. 5:09-cv-414, 2009 WL 1152187 (E.D. Pa. Apr. 27, 2009) 9

Smith v. Aztec Well Servicing Co.,
462 F.3d 1274 (10th Cir. 2006). 15

Steiner v. Mitchell,
350 U.S. 247 (1956). . . . . *passim*

Suggars v. Amazon.com,
No. 3:13-cv-906 (M.D. Tenn. Sept. 9, 2013) 17

U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Allenwood, Pa.,
65 FLRA 996 (2011). 9

Vance v. Amazon.com,
No. 3:13-cv-765 (W.D. Ky. Aug. 1, 2013). 18

Vega v. Gasper,
36 F.3d 417 (5th Cir. 1994). 15

Weston v. Wireless Advocates LLC,
No. 5:14-cv-1705 (N.D. Cal. Apr. 14, 2014) 17

Whalen v. United States,
93 Fed. Cl. 579 (2010). 9

Page

STATUTES & REGULATIONS

29 U.S.C. § 216(b) 16

29 U.S.C. § 254(a) 4, 14

29 U.S.C. § 255(a) 16

29 U.S.C. § 260 16

29 U.S.C. §§ 201-219 3

29 U.S.C. §§ 251-262 4

29 C.F.R. § 790.7(f) 14

29 C.F.R. § 790.7(g) 8

29 C.F.R. § 790.8 n.63 16

29 C.F.R. § 790.8(b)(1) 8

29 C.F.R. § 790.8(c) 8

Page

OTHER AUTHORITIES

ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS TABLE C-2 (2003) 17

ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS TABLE C-2 (2013) 17

ASS'N OF CERTIFIED FRAUD EXAMINERS, REPORT TO THE NATIONS ON OCCUPATIONAL FRAUD AND ABUSE, 2012 GLOBAL FRAUD STUDY (2012), http://www.acfe.com/uploadedFiles/ACFE_Website/Content/rttn/2012-report-to-nations.pdf. 18

PHILIP P. PURPURA, SECURITY LOSS & PREVENTION (Mary Jane Peluso et al. eds., 6th ed. 2013) .. .18

RICHARD C. HOLLINGER, AMANDA ADAMS, UNIV. OF FLA., DEP'T OF SOCIOLOGY & CRIMINOLOGY & LAW, 2011 NATIONAL RETAIL SECURITY SURVEY FINAL REPORT (2012), http://www.clas.ufl.edu/users/rhollin/srp/srp.htm 19

The Retail Litigation Center, Inc., the Chamber of Commerce of the United States of America, the Society for Human Resource Management, the National Association of Manufacturers and the National Federation of Independent Business Small Business Center respectfully submit this brief as *amici curiae* in support of petitioners.*

INTEREST OF *AMICI CURIAE*

The Retail Litigation Center, Inc. (RLC) is a public policy organization that identifies and engages in legal proceedings which affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to

---

*No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioner and Respondents have filed blanket consents to the filing of *amicus* briefs.

represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

Founded in 1948, the Society for Human Resource Management (SHRM) is the world's largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the American economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Federation of Independent Business Small Business Legal Center, a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small

business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small business association, representing 350,000 members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

Collectively, the foregoing *amici curiae* represent a wide cross-section of the employer and human-resource community throughout the United States. American employers dedicate considerable time, energy, and resources to achieving compliance with the myriad statutes governing the workplace, while at the same time maintaining and creating much-needed jobs.

Many employers require brief pre- and post-shift security screening of employees, often as an important component of efforts to provide safe work environments and to combat the widespread problem of employee theft. Longstanding precedent has held that such screenings are not subject to compensation under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219. As discussed below, the Ninth Circuit's contrary decision holding that the time spent in post-shift security screenings may be compensable under the FLSA imposes significant costs and operational burdens on employers and could lead them to weaken or eliminate these security measures entirely. It also would create significant uncertainty regarding the compensability of pre- and post-shift activities that have long been understood to be noncompensable.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question of whether routine post-shift security screenings of employees are compensable under the FLSA. Such screenings are conducted by many employers, as in this case, to help prevent theft. In the retail industry alone, employee theft imposes costs estimated at almost $16 billion each year.

The resolution of this case could also have an effect on the compensability of the entire broad range of pre- and post-shift screenings, conducted by employers to ensure the security of employers' property and the safety of employees and the public. Until the decision below, employers have been able to rely on a uniform body of caselaw holding that security screenings are not compensable under the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251-262, as applied by this Court and regulations adopted by the Department of Labor.

Responding to what it believed had been overly expansive interpretations of the FLSA, more than half a century ago Congress narrowed the statute's scope by enacting the Portal-to-Portal Act. In relevant part, the Portal-to-Portal Act provides that employers are not required to compensate an employee for activities which are "preliminary" or "postliminary" to "the principal activity or activities for which such employee is employed to perform." 29 U.S.C. § 254(a).

The Portal-to-Portal Act does not define what constitutes "principal activity or activities," nor does it define what it means for an activity to be "preliminary"

or "postliminary." Nearly a decade after the Act was passed, however, this Court created a two-part test for determining applicability of the FLSA and held that "principal activity or activities" includes pre- or post-shift activities that are themselves an "integral and indispensable part" of the principal activities for which the employee is employed. *Steiner v. Mitchell*, 350 U.S. 247, 252-53, 256 (1956). This Court reaffirmed that test in *IBP, Inc. v. Alvarez*, 546 U.S. 21, 30 (2005).

The Ninth Circuit's decision undermines the decades-old understanding of the Portal-to-Portal Act as interpreted by this Court in *Steiner* and *Alvarez* and by the Department of Labor. In holding time spent in post-shift security screenings to be compensable, the Ninth Circuit incorrectly applied the well-established "integral and indispensable" test and instead developed a new approach based on its view that the screenings were compulsory and done for the employer's benefit. In so ruling, the court did away with the requirement under the Portal-to-Portal Act of a close and intertwined relationship between the productive work for which an employee is hired and the activity for which the employee seeks additional compensation.

The Ninth Circuit's test, if adopted by this Court, would force employers to choose between incurring greater costs to retain security screenings, which are a critical tool to address workplace security and theft, and foregoing or reducing security measures so as not to incur additional labor costs. This would result in decreased workplace safety, increased losses due to theft, and ultimately increased costs for the U.S. consumer. In addition, affirmation of the Ninth Circuit's decision would

simultaneously create uncertainty and thus increase litigation regarding an aspect of the FLSA that had long been understood to be settled.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION MISAPPLIES THE PORTAL-TO-PORTAL ACT AND THIS COURT'S DECISIONS INTERPRETING THE ACT

The Ninth Circuit's decision runs afoul of the text and history of the Portal-to-Portal Act, as well as this Court's and the Department of Labor's interpretation of the Act. In *Steiner*, this Court interpreted the Portal-to-Portal Act to require compensation of activities before and after an employee's principal work activities, like security screenings, only when "they are an integral part of and indispensable to [employees'] principal activities for which covered workmen are employed." *Steiner v. Mitchell*, 350 U.S. 246, 256 (1956).

The Portal-to-Portal Act analysis thus requires two steps. First, a court should identify the job responsibilities and activities that the employee was hired to perform. Once those primary productive activities are identified, the court should then identify additional activities (if any) so intertwined with those productive activities that they are not only *necessary*, but are also *essential* for the *effective* performance of the employee's productive work. Activities related to, and even necessary for, the performance of that work are not compensable unless they meet both aspects of the "integral and indispensable" test.

In *Steiner*, employees worked in a potentially toxic environment. Those employees' job responsibilities included the "extensive use of dangerously caustic and toxic materials." 350 U.S. at 248. This Court determined that the changing by employees into special protective clothes at the beginning of the shift and changing out of those clothes and showering at the end of the shift were integral and indispensable to the job responsibility of working in that caustic environment. *Id.* at 254-56.

Similarly, this Court's analysis in *IBP v. Alvarez* focused on the primary work activities the employees were required to perform. 546 U.S. 21 (2005). One of the cases on appeal in *Alvarez* involved production workers at a poultry processing plant. *Id.* at 37. The Court determined that the donning and doffing of special protective gear was integral and indispensable to the worker's responsibilities at the processing plant and therefore subject to compensation under the FLSA. *Id.* at 40. However, this Court held that time spent waiting to don the special protective gear was not compensable under the FLSA. The Court concluded that an expansion of the "integral and indispensable" test to include time waiting to don was contrary to the text of the Portal-to-Portal Act: "We discern no limiting principle that would allow us to conclude that the waiting time in dispute here is a 'principal activity' under § 4(a) [of the FLSA], without also leading to the logical (but untenable) conclusion that the walking time at issue in *Anderson* [*v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)[1]] would

1. Shortly after the passage of the FLSA, employers faced large collective actions for time spent, for example, walking to the workplace from the parking lot. *See id.*, 328 U.S. at 683. Congress determined that these interpretations of the FLSA had gone too far in awarding compensation for pre- and post-work activities

be a 'principal activity' under § 4(a) and thus would be unaffected by the Portal-to-Portal Act." *Alvarez*, 546 U.S. at 40-41.

This understanding of the Portal-to-Portal Act is endorsed by more than 50 years of regulatory guidance from the Department of Labor. The examples in the regulations are consistent with *Steiner* and *Alvarez* and support the interpretation advanced by *amici*. For example, "activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities." 29 C.F.R. § 790.8(c); *see also id.* § 790.7(g) ("checking in and out and waiting in line to do so" and "waiting in line to receive pay checks" would normally be considered uncompensable preliminary or postliminary activities).

The regulations also provide examples of activities that *are* integral to an employee's performance of his or her principal job activities and therefore compensable under the FLSA. For example, a lathe worker who must "oil, grease or clean his machine, or install a new cutting tool" receives compensation for that time. 29 C.F.R. § 790.8(b)(1). That determination relies upon the connection between the lathe worker's principal productive activity (operating a lathe machine) and the additional, interrelated activities to the principal activity (oiling, greasing, and cleaning the lathe machine) that are needed to complete the task properly. There is no such connection between a post-shift security screening and the employee's

---

and had created unexpected and unacceptable liabilities for businesses. The result of these congressional concerns was the Portal-to-Portal Act. *See Steiner*, 350 U.S. at 253.

principal work, whether as here in a warehouse, or in a retail store or other establishment.

Prior to the Ninth Circuit's decision in this case, federal appellate and district courts had uniformly (and correctly) held that undergoing security screening at a private employer is a noncompensable preliminary or postliminary activity in a wide variety of settings. *See, e.g.*, *Gorman v. Consol. Edison*, 488 F.3d 586, 593-94 (2d Cir. 2007) (power plant); *Bonilla v. Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1344-45 (11th Cir. 2007) (airport); *Anderson v. Purdue Farms, Inc.*, 604 F. Supp. 2d 1339, 1358-59 (M.D. Ala. 2009) (food processing plant); *Sleiman v. DHL Express*, No. 5:09-cv-414, 2009 WL 1152187, at *4-5 (E.D. Pa. Apr. 27, 2009) (mail-sorting center). Cases involving federal workplaces have reached the same conclusion. *See Whalen v. United States*, 93 Fed. Cl. 579, 601 (2010) (air traffic control center); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Allenwood, Pa.*, 65 FLRA 996, 999-1000 (2011) (prison).

In *Gorman v. Consolidated Edison*, 488 F.3d 586 (2d Cir. 2007), for example, the Second Circuit concluded that security screenings of employees at a nuclear power plant, "while arguably indispensable, are not integral to their principal activities." *Id.* at 593. Security screenings were "modern paradigms of the preliminary and postliminary activities described in the Portal-to-Portal Act, namely travel time." *Id.* According to the Second Circuit, the compensability of preliminary activities such as security screening did not turn on "the purpose of any preliminaries, or how much time such preliminaries may consume," but rather their relationship to the principal productive activities of the employee. *Id.* Without a

meaningful connection to the principal job activity, no compensation was required under the Portal-to-Portal Act.

The Ninth Circuit's ruling here, by contrast, is fundamentally flawed because it effectively eliminates half of the "integral and indispensable" test by failing to require a relationship between the post-shift security screening of employees and the employees' productive activities. The Ninth Circuit instead emphasized the screenings were required by the employer and were intended to prevent employee theft. The Ninth Circuit concluded that the test was met because "the security clearances are necessary to employees' primary work as warehouse employees and done for Integrity's benefit." Pet. App. 11-12. Under the Ninth Circuit's approach, a court would no longer need to consider whether pre- or post-shift activities are an integral part of an employee's productive work activities, but only whether the activity is necessary and creates a potential benefit for the employer.

The Ninth Circuit's emphasis on a "benefit to the employer" is particularly inappropriate. As alleged in the complaint, the security screenings at issue are performed to prevent theft of merchandise by employees. Indeed, many employers screen employees for that purpose. Prevention of employee theft "benefits" a wide range of groups, including employers, employees, the community in which the business operates and ultimately the U.S. consumer. However, the time spent ensuring that employees are not stealing merchandise is not an essential part of the employee's fulfillment of his productive responsibilities at work. The employees at Integrity Staffing, for example, are hired to staff the warehouse.

Stealing inventory is the antithesis of their—or really any employee's—duties. Not stealing is a *legal* obligation, not one imposed by an employer. Efforts to prevent employee theft are not in any sense a part of the productive work that employers require of their employees.[2]

Moreover, not all employers within the same industry, *e.g.*, not all retailers, not all manufacturers, conduct security screenings. This fact alone shows that security checks are neither "integral" nor "indispensable" to employees' job activities whether (as here) in a warehouse, or in a retail store or other establishment. Instead, participating in a security screening should be treated similarly to checking in and out. Both are activities required by the employer typically involving minimal time that employees regularly perform at the beginning or end of shifts. Neither can reasonably be viewed as integral to an employee's performance of his or her principal job activities; there can be no question that employees can perform their job duties without checking in or out or going through a security check.

---

2. The Ninth Circuit attempted to rationalize its holding here with *Gorman* and *Bonilla* on the ground that in those two cases "everyone who entered the workplace had to pass through a security clearance." Pet. App. 12. But that is a distinction without a difference. The fact that some employees might not pass through a security screening—because they are not on the warehouse floor, for example—offers no reason to find that screenings are integral and indispensable to the principal activities of employees who do.

II. ADOPTION OF THE NINTH CIRCUIT'S NEW RULE WOULD DISRUPT ESTABLISHED WORKPLACE PRACTICES BY IMPOSING AN UNWIELDY TEST THAT HAS ALREADY INCREASED LITIGATION

Affirming the Ninth Circuit's decision would inject uncertainty into what had been a settled area of the law upon which employers have relied, leading to increased litigation with associated costs of defense and pressure to settle collective actions. Furthermore, in industries, such as the retail, manufacturing and service industries, where productivity is critical, margins are thin, and labor costs usually constitute the largest non-inventory and non-operations expense, even slight increases in costs, when multiplied by thousands of employees, can have a significant effect on competitiveness. Alternatively, many employers would have to consider modifying or eliminating security screenings altogether with predictable detrimental impact on their efforts to reduce employee theft or otherwise provide for a more secure workplace.

A. The Ninth Circuit's Rule Would Be Difficult To Apply And Lead To Uncertainty For Employers

This Court has recently warned that, in the FLSA context, "the potential for unfair surprise is acute" when altering long-standing interpretations of the statute. *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012). As described above, until the Ninth Circuit's decision, courts had uniformly held that security screenings of employees were not compensable under the FLSA. Employers have long understood, consistent

with *Steiner*, *Alvarez* and the Department of Labor's regulations, that the FLSA and the Portal-to-Portal Act do not require them to compensate employees for time spent in security screenings, regardless of their form. Employers have developed and conducted their screenings based on the reasonable expectation that such screenings are not compensable.

Employers conduct security screenings in a variety of ways. For example, employers use bag checks, wand swipes, metal detectors, and vehicle checks before and after an employee leaves the employer's premises. Some employers screen every person entering or exiting the employer's premises. Others only screen employees, or only those employees working in certain areas of the organization or who have certain job responsibilities. Some employers occupy part of a building and the building imposes and handles security screenings. Security screenings therefore, vary according to a multitude of factors, some outside of employers' control.

A decision from this Court affirming the Ninth Circuit's novel ruling would be difficult to apply in practice and would lead to uncertainty regarding employers' obligations under the FLSA. The Ninth Circuit's test would require compensation under the FLSA if the activity is required by and provides a "benefit" to the employer and is necessary for the employees' work. This erroneous "employer benefit" standard is vague and unworkable, and would engender further litigation along several lines.

For example, would the test apply only to compensation for security screenings that are conducted for anti-theft purposes, or would it apply to screening for other purposes? There is no principled basis in the text of the FLSA to draw the line at screenings for "anti-theft" purposes, as opposed to screening conducted for other purposes that might benefit the employer. Some employers conduct entrance screenings to prevent weapons or other dangerous materials from entering the workplace. Under the employer-benefit test, would the screening be compensable because the employer "benefits" from a safe workplace? Other groups, however, such as employees, customers, and the public, also benefit from safety screening. Does the employer have to be the sole beneficiary of the activity? The primary beneficiary? Merely one of the beneficiaries? To avoid further litigation regarding these issues, the proper inquiry is the specific activity in question, not the reasons the employer required it or the person or group who benefits most. Indeed, requiring employees to walk from a parking lot to the workplace plainly benefits the employer and is necessary for employees to work, but that is precisely the type of activity that the Portal-to-Portal Act was designed to make noncompensable. 29 U.S.C. § 254(a); 29 C.F.R. § 790.7(f) (*See* p.6 n.1 above).

Additionally, the Ninth Circuit's decision creates further uncertainty for employers to the extent it implies that the result can depend on the length of time that the security screenings are alleged to take. Respondents have emphasized that their complaint alleges that the security screening took as long as 25 minutes. In the experience of the various members of the *amici*, a time period of 25 minutes for a security screening is an aberration. Security screenings of whatever type almost always take no more

than a few minutes, even including waiting time. For example, a bag check security screening conducted by an employer would be similar to a bag check conducted when entering a professional sporting event. These types of screenings typically take less than a minute (not including any time waiting for the screening). A metal detector screening would be equivalent to the screening that members of the public go thorough when entering a government building. The time that it takes to go through the actual security check is often minimal. There may be times when an employee has to wait longer than usual for the security check, such as the end of a shift. Consistent with *Alvarez*, however, waiting time is not compensable under the FLSA.

The length of time for the screenings, including any wait time, bears no relevance to whether the activity is compensable. Indeed, enactment of the Portal-to-Portal Act was driven by congressional concerns that judicial interpretations of the FLSA had gone too far in awarding compensation for a broad range of pre- and post-work activities including waiting to check in and walking to the workplace from the parking lot. *See Steiner*, 350 U.S. at 253. Since that time, circuit courts have repeatedly held that even extended waits for preliminary or postliminary activities do not require compensation under the FLSA. *See Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274 (10th Cir. 2006) (travel ranging from 30 minutes to three-and-a-half hours not compensable); *Vega v. Gasper*, 36 F.3d 417 (5th Cir. 1994) (four hours of traveling on employer's bus not compensable); *Kavanagh v. Grand Union Co., Inc.*, 192 F.3d 269 (2d Cir. 1999) (commuting time up to seven hours in a day not compensable); *Imada v. City of Hercules*, 138 F.3d 1294 (9th Cir. 1998) (travel time for

police officers to remote site for training not compensable). The Department of Labor's regulations also focus on the type of activity instead of its length. 29 C.F.R. § 790.8 n.63. Thus, both regulatory and judicial precedent agree that the key inquiry is whether there is an integral and indispensable relationship between the pre- or post-shift activity and the principal activities for which the employee is employed, regardless of how long the pre-or post-shift activity takes.

B. The Ninth Circuit's Rule Would Lead To Increased Litigation And Undue Pressures On Employers To Settle

Adopting the Ninth Circuit's rule would lead to a flood of unnecessary litigation exposing employers to unanticipated liability. The uncertainties created by the Ninth Circuit's holding, discussed above, are amplified by the leverage plaintiffs could exert due to particular features of FLSA claims. First, the FLSA's collective-action device allows plaintiff's counsel to leverage a lawsuit involving a single employee's claim into a nationwide lawsuit involving tens of thousands of employees. *See* 29 U.S.C. § 216(b) (providing that employees may sue on behalf of themselves "and other employees similarly situated"). Second, employees can recover double damages and mandatory attorneys' fees. 29 U.S.C. § 216(b). Third, because the FLSA has no intent element, an employer's good-faith belief that it has complied with the statute—following decades of previous precedent by this Court and Department of Labor regulations—may serve as only a limited defense if this Court decides to redefine the Portal-to-Portal Act. *See* 29 U.S.C. §§ 255(a), 260 (employer's intent affects the statute of limitations and award of double damages, but not attorneys' fees).

In recent years, the employer community has been inundated by an ever-growing tidal wave of FLSA litigation. For example, a total of 4,055 FLSA actions were commenced in district courts throughout the United States during the 12-month period ending March 31, 2003. ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS Table C-2 (2003). For the 12-month period ending March 31, 2013, 7,764 FLSA actions were commenced in district courts throughout the United States Admin. ADMIN. OFFICE OF U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS Table C-2 (2013). This represents a 90 percent increase from the same time period only a decade earlier. These numbers could be expected to grow even further if the Ninth Circuit's decision is affirmed. Indeed, since the Ninth Circuit's decision, a number of additional FLSA collective actions have been filed, seeking hundreds of millions of dollars from employers based upon the theory endorsed by the Ninth Circuit.[3]

---

3. In a suit against CVS Pharmacy, the district court initially dismissed the plaintiffs' FLSA claims regarding security screenings based upon *Steiner* and its progeny. *See Ceja-Corona v. CVS Pharmacy*, No. 12-1868, 2013 WL 796649, at *9 (E.D. Cal. Mar. 4, 2013). After the Ninth Circuit's decision, the district court reversed itself and that claim is now proceeding. *See* 2013 WL 3282974 (E.D. Cal. July 2, 2013). Similar claims have been filed against other major employers. *Weston v. Wireless Advocates LLC*, No. 5:14-cv-1705 (N.D. Cal. Apr. 14, 2014); *Barba v. Trinity Servs. Group., Inc.*, No. 4:13-cv-1280 (D. Ariz. Feb. 19, 2014); *Le v. CVS Caremark Corp.*, No. 1:13-cv-6438 (E.D.N.Y. Feb. 5, 2014); *Ruiz v. JCP Logistics, Inc.*, 8:13-cv-01908-JLS-AN (C.D. Cal., Dec. 5, 2013); *Kalin v. Apple, Inc.*, No. 3:13-cv-4727 (N.D. Cal. Oct. 10, 2013); *Roberts v. TJX Cos.*, No. 3:13-cv-4731 (N.D. Cal. Oct. 10, 2013); *Johnson v. Amazon.com*, No. 1:13-cv-153 (W.D. Ky. Sept. 17, 2013); *Suggars v. Amazon.com*, No. 3:13-cv-906 (M.D. Tenn. Sept. 9, 2013); *Allison v. Amazon.com*, No. 2:13-cv-1612 (W.D. Wash.

Ratification of the Ninth Circuit's radical new test, therefore, would increase pressure on employers to settle large FLSA collective actions to avoid incurring expensive and time-consuming discovery obligations (and an ultimately uncertain outcome). This Court should repudiate the Ninth Circuit's test and state definitively that security screenings are not compensable.

C. Employers Could Be Deprived Of An Important Tool Used To Mitigate The Serious Problem Of Employee Theft

Employee theft is a serious concern for employers. Some estimates have found that employers lose five percent of revenue from theft, fraud, and other losses. ASS'N OF CERTIFIED FRAUD EXAMINERS, REPORT TO THE NATIONS ON OCCUPATIONAL FRAUD AND ABUSE, 2012 GLOBAL FRAUD STUDY 4 (2012), http://www.acfe.com/uploadedFiles/ACFE_Website/Content/rttn/2012-report-to-nations.pdf (last visited June 3, 2014). Common methods of theft include removing employer merchandise and other company property from the workplace. PHILIP P. PURPURA, SECURITY LOSS & PREVENTION 168-69 (Mary Jane Peluso et al. eds., 6th ed. 2013).

The retail industry faces particular problems with employee theft. As described in a recent survey of the problem: "Retailers attributed 44.2% of their inventory shrinkage to employee theft. Assuming a total shrinkage

---

Sept. 6, 2013); *Vance v. Amazon.com*, No. 3:13-cv-765 (W.D. Ky. Aug. 1, 2013); *Frlekin v. Apple Inc.*, No. 3:13-cv-3451 (N.D. Cal. July 25, 2013); *Cortez v. Ross Dress for Less, Inc.*, No. 5:13-cv-1298 (C.D. Cal. July 24, 2013).

dollar amount of approximately $35.28 billion, this translates into an annual employee theft price tag of $15.9 billion. This is a staggering monetary loss to come from a single crime type. In fact, there is no other form of larceny that annually costs more money than employee theft." RICHARD C. HOLLINGER, AMANDA ADAMS, UNIV. OF FLA., DEP'T OF SOCIOLOGY & CRIMINOLOGY & LAW, 2011 NATIONAL RETAIL SECURITY SURVEY FINAL REPORT 7 (2012), http://www.clas.ufl.edu/users/rhollin/srp/srp.htm (last visited on June 3, 2014). The significant costs of employee theft are of course incorporated into retailers' prices and passed on to consumers.

If compensation for security screenings is newly required under the FLSA, many employers will be faced with a difficult choice. Employers could continue security screenings and incur additional labor costs to compensate employees for the now-compensable time spent on post-shift security screening, thus placing more pressure on already slim margins and incurring additional costs related to compliance with the new requirements of the FLSA.[4] On the other hand, employers could forego security screenings or modify them in ways that make them less effective but do not add compensable time at the beginning and end of the workday. The second option will not increase labor costs but will likely increase the losses that employers experience due to theft of company property and decrease the safety of a work space.

---

4. Additional costs could include relocation of time clocks to be in a location after the security screening location or new equipment and systems to track time employees spend going through security screenings.

Furthermore, requiring employers to adjust their security screening practices in order to accurately compensate employees for their time spent in screening or to avoid additional labor costs would present considerable practical difficulties. For example, some security screenings, such as those conducted in shared facilities, occur outside the workplace in areas the employer does not control. That obstacle can significantly complicate employers' ability to track properly the time spent by employees in security screenings. In addition, for many employers, particularly retailers, moving the security screening inside the workplace would undermine the very purpose of the screening: preventing theft of company property from the workplace.

All of these problems could be avoided by adhering to the text of the Portal-to-Portal Act and the long-standing "integral and indispensable" test established in *Steiner*, recently reaffirmed in *Alvarez*, and followed by the Department of Labor's regulations for more than 50 years. The Ninth Circuit's unprecedented, unworkable and fundamentally incorrect view of the Portal-to-Portal Act should be rejected.

CONCLUSION

For the foregoing reasons and those in Petitioner's brief, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

DANIEL J. DAVIS
PROSKAUER ROSE LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004
(202) 416-6800

EDWARD A. BRILL
Counsel of Record
PROSKAUER ROSE LLP
Eleven Times Square
New York, NY 10036
(212) 969-3000
ebrill@proskauer.com

Counsel for Amici Curiae

(*Additional Counsel Listed on Next Page*)

DEBORAH R. WHITE
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street
Arlington, VA 22209
(703) 600-2067

Counsel for Amicus Curiae Retail Litigation Center, Inc.

NANCY B. HAMMER
SOCIETY FOR HUMAN RESOURCE MANAGEMENT
1800 Duke Street
Alexandria, VA 22314
(703) 535-6030

Counsel for Amicus Curiae Society for Human Resource Management

KAREN R. HARNED
ELIZABETH MILITO
NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER
1201 F Street, NW, Suite 200
Washington, DC 20004
(202) 406-4443

Counsel for Amicus Curiae National Federation of Independent Business Small Business Legal Center

KATE COMERFORD TODD
STEVEN P. LEHOTSKY
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

LINDA E. KELLY
QUENTIN RIEGEL
PATRICK N. FORREST
NATIONAL ASSOCIATION OF MANUFACTURERS
733 10th Street, NW
Washington, DC 20001
(202) 637-3000

Counsel for Amicus Curiae National Association of Manufacturers